



Access to Justice in Multilevel Trade Regulation: Brazil, MERCOSUR and the WTO

Stefan Staiger Schneider

Thesis submitted for assessment with a view to obtaining
the degree of Doctor of Laws of the European University Institute

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Department of Law

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Abstract

As indicated in the title, this thesis examines access to justice in multilevel trade regulation with a focus on Brazil, the ‘Common Market of the South’ (MERCOSUR) and the World Trade Organization (WTO). Given that there is a direct link between the MERCOSUR and the European Union (EU), because the former is in several aspects comparable to the European Economic Community (EEC) and even the European Communities (EC), the research comprises a comparative legal analysis among four legal systems: (1) the Brazilian, (2) the MERCOSUR, (3) the EU and (4) the WTO. In order to achieve this goal, it employs legal texts, case law and scholarship in different languages (i.e., English, German, Portuguese and Spanish) and from different jurisdictions. While on the one hand it endeavours to explain the problems of access to justice in multilevel trade regulation and how they may be managed, on the other hand it intends to identify what access to justice and rule of law mean in the context of conflicts between the Brazilian, MERCOSUR and WTO jurisdictions. The thesis is structured into six main chapters, as follows: (I) the Constitutional Dimension of Access to Justice, (II) the Legislative Dimension of Access to Justice, (III) the Brazilian Dimension of Access to Justice, (IV) the MERCOSUR Dimension of Access to Justice, (V) the WTO Dimension of Access to Justice and (VI) the Final Conclusions. It begins by clarifying the author’s personal understanding of what access to justice is. Then, it argues that the background of multilevel judicial protection is essentially formed by the proliferation of international courts and tribunals in general and, specifically to trade, the proliferation of regional trade agreements and free trade agreements, which very often include some form of dispute settlement system. Accordingly, divergent or even conflicting rulings regarding the same dispute and/or the same or similar legal issue are possible. The research undertaken extends, therefore, *Mauro Cappelletti’s* world famous comparative legal research on access to justice. Furthermore, by expanding the work of the Italian jurist into the field of international economic law and establishing links to EU law, human rights, constitutional law, constitutionalism and rule of law, among others, this thesis also argues that constitutionalism is an effective mechanism for limiting abuses of power and protecting human rights, and is a way of connecting diverse regimes.

For my parents

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Being a Ph.D. researcher at the European University Institute (EUI) was a privilege, as it is probably the best institution in the world to write a thesis on access to justice. The EUI has a unique environment that is due to its very high academic level, innovative thinking, excellent library and multicultural community. This thesis represents a very important part of my life and, besides being a professional exercise, allowed me to meet wonderful individuals who were important for my positive experience at the EUI and in Florence. Although it is difficult to name everybody, a special thanks to Evaldo Xavier Gomes, Lúcio Manuel Rocha de Souza, Fabiano de Andrade Corrêa, Laura Puccio, Lucas Lixinski, Andrés Malamud, Samantha Ribeiro,

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Table of Contents

Introduction	15
1. Background	16
2. Focus of the thesis	17
3. Methodology	18
4. Structure of the thesis	19
5. Outline of the chapters	19
Chapter I – The Constitutional Dimension of Access to Justice	22
1. Introduction to Chapter I	22
2. Access to Justice as a Human Right	23
3. Access to Justice as a Constitutional Right	42
4. Constitutionalism	47
5. Chapter Conclusion	61
Chapter II – The Legislative Dimension of Access to Justice	66
1. Introduction to Chapter II	66
2. Economic Justice	66
3. Access to Justice as a Legislative Right in Multilevel Trade Regulation	69
3.1. Market Freedom	77
3.2. Globalisation of Trade	94
3.3. Trade Law and Access to Justice	101
4. Multilevel Judicial Protection of Access to Justice in Trade Regulation?	104
5. Chapter Conclusion	108
Chapter III – The Brazilian Dimension of Access to Justice	111
1. Introduction to Chapter III	111
2. Historical Constitutional Analysis about Access to Justice in Brazil	112
2.1. Imperial Period	112
2.2. Constitution of 1891	113
2.3. Constitution of 1934	113
2.4. Constitution of 1937	115
2.5. Constitution of 1946	115
2.6. Constitution of 1967	116
2.7. Constitution of 1988	118
3. Infra-Constitutional Legislation about Access to Justice	121

4. Brazilian Constitutional Law and International Treaties	122
5. Present Organisation of the Brazilian Judiciary	127
6. The Role of Judges in Brazil	130
6.1. <i>Súmulas</i>	138
6.2. <i>Súmulas Vinculantes</i>	139
7. Alternative Dispute Settlement Procedures (Non-State-Owned)	143
7.1. Arbitration	143
7.2. Mediation	148
7.3. Private Settlement	148
8. National and Foreign Trade Regulation	151
8.1. Foreign Trade	151
a. Department of Foreign Trade Operations – DECEX	152
b. Department of International Negotiations – DEINT	153
c. Department of Planning and Development of Foreign Trade – DEPLA	153
8.2. Trade Defence	154
a. Brazilian Chamber of Foreign Trade – CAMEX	160
b. Department of Trade Defence – DECOM	162
9. Chapter Conclusion	163
Chapter IV – The MERCOSUR Dimension of Access to Justice	167
1. Introduction to Chapter IV	167
2. Introduction to the MERCOSUR and Historical Background	168
1.1. The situation of Paraguay and Venezuela	172
3. Purposes	174
4. Institutions	178
4.1. Decision-Making Bodies	180
a. The Common Market Council (CMC)	181
b. The Common Market Group (GMC)	182
c. The Trade Commission of the MERCOSUR (CCM)	183
d. PARLASUR	184
e. The <i>Tribunal Permanente de Revisión</i> (TPR)	192
e.a. TPR: Intergovernmental or Supranational?	201
5. Interim Balance of the MERCOSUR	205
6. Legal Sources of the MERCOSUR	210
6.1. MERCOSUR Primary Law	218

6.2. MERCOSUR Secondary Law	219
6.3. Addressees of MERCOSUR Law	222
7. The MERCOSUR and the WTO	225
7.1. The relationship between MERCOSUR Member States and the remaining WTO Members	229
8. MERCOSUR Law and Brazilian Constitutional Law	229
9. MERCOSUR Economic Freedoms	236
9.1. Free Movement of Persons	237
9.2. Freedom to Provide Services and Freedom of Establishment	238
9.3. Free Movement of Capital	239
9.4. Free Movement of Goods	239
9.5. Freedom of Competition	240
10. MERCOSUR Law and Human Rights	240
10.1. The <i>Bridges Case</i>	246
a. Final Remarks	252
11. Access to Justice in the MERCOSUR	253
11.1. Private Persons	255
11.2. Cooperation Protocols and Conventions	260
11.3. The <i>Opinión Consultiva</i>	264
a. The procedural rules of the <i>Opinión Consultiva</i>	266
b. The first <i>Opinión Consultiva</i>	269
b.a. The decision of the <i>Tribunal Permanente de Revisión</i>	271
b.b. The decision of the national court after the <i>Opinión Consultiva</i>	271
b.c. Final Remarks	274
12. Case law at national level	276
12.1. Same treatment of products in the fields of taxes, duties and other country- imposed charges	277
Case a.: A suit for a mandamus concerning milk from Uruguay	277
Case b.: A suit for a mandamus concerning the confiscation of a car of an Argentinean company	278
12.2. Judicial cooperation and assistance in civil, commercial, labour and administrative matters	282
12.3. Equal Procedural Treatment	282

13. Chapter Conclusion	284
Chapter V – The WTO Dimension of Access to Justice	288
1. Introduction to Chapter V	288
2. The WTO dispute settlement system in light of the overall objectives of the WTO	289
3. The differences between the dispute settlement systems of the WTO and the MERCOSUR both with respect to means as well as objectives	300
4. Brazil and the WTO	305
4.1. Case law at national level	308
a. <i>Súmulas</i> of the STJ concerning the GATT	308
b. A selection of STJ rulings	309
5. Access to Justice in the WTO	317
5.1. Access to Justice for WTO Members	318
5.2. Access to Justice for Private Parties	323
6. The constitutionalisation of WTO law	331
7. Multilevel case law	337
7.1. <i>Brazil Tyres Cases</i>	337
a. MERCOSUR Level	338
b. WTO Level – Panel	340
c. WTO Level – Appellate Body	341
d. Brazilian Level – Federal Supreme Court (STF)	344
e. Concluding Remarks	347
7.2. Poultry Disputes	351
a. Concluding Remarks	354
8. Chapter Conclusion	355
Chapter VI – Final Conclusions	362
Bibliography	371

Introduction

This PhD thesis is about access to justice, trade and multilevel trade regulation at the national, regional and global levels. Its purpose is to analyse the challenges concerning access to justice in trade governance specifically in Brazil, the Common Market of the South (MERCOSUR)¹ and the World Trade Organization (WTO), respectively. It is, as a result, of interest to multiple audiences: human rights, Brazilian, MERCOSUR, EU and WTO lawyers. Even though the thesis is not about justice, it is propitious to recall what *Plato* wrote about justice in *Protagoras*, namely that “a sense of justice is a prerequisite to living a civic life, to living in community”². The concept of justice is broad and has several different interpretations, which may vary according to the application that one intends in the fields of law, philosophy, politics, sociology and theology. For *Kelsen*,³ the concepts of law and justice do not confound, and he believes that justice is a paradigm for the creation of a just law. Access to justice covers several different problems and has to enable a civic life. In fact, since this research involves national, regional, international and supranational law, access to justice has to enable global civics,⁴ as well.

While on the one hand it is an honour to write about this topic at the European University Institute, where *Mauro Cappelletti* conducted his revolutionary and world famous project on access to justice, from which resulted several books,⁵ it also poses a

¹ While ‘MERCOSUR’ is the acronym in Spanish for ‘Mercado Común del Sur’, ‘MERCOSUL’ is the acronym in Portuguese and means ‘Mercado Comum do Sul’. I decided to use the word ‘Mercosur’, as most of the literature outside South America, besides WTO case law, applies it.

² Plato, *Protagoras* (translated by Benjamin Jowett and Martin Oswald), New York, 1965, pp. 20-21 quoted in Garcia, Frank J., *Trade, Inequality, and Justice: Toward a Liberal Theory of Just Trade*, Ardsley, 2003, p. 2.

³ Kelsen, Hans, *O que é justiça*, São Paulo, 1997, p. 292, quoted in Hess, Heliana M. C., *Acesso à justiça por reformas judiciais*, Campinas, 2004, p. 12.

⁴ Even though there are several plausible objections to the term ‘global civics’ and no world government, Hakan Altinay defends that ‘global civics’ is possible and has developed a concept for it. For details, see Altinay, Hakan, *The Case for Global Civics*, In: Brookings Institution, *Global Economy & Development Working Paper* 38, March 2010, to be found at http://www.brookings.edu/~media/Files/rc/papers/2010/03_global_civics_altinay/03_global_civics_altinay.pdf. Date of access: 25th March 2011.

⁵ E.g., Cappelletti, Mauro/Garth, Bryant, et al. (Eds.), *Access to Justice*, Milano, Giuffrè, 1978-1979 (6 volumes); Cappelletti, Mauro/Weisner, John/Secombe, Monica, *Access to Justice and the Welfare State*, Alphen aan den Rijn, Sijthoff, 1981; Cappelletti, Mauro/Garth, Bryant/Amaral, Abogado S. (Eds.), *El acceso a la justicia: Movimiento mundial para la efectividad de los derechos – Informe general*, La Plata, Colegio de abogados del Departamento judicial de La Plata, 1983; Cappelletti,

challenge, for the reason that one of my aims is extending *Cappelletti's* comparative legal research, namely regarding one specific legal field: international economic law. The choice for the topic is, in consequence, an expansion of the work of the Italian jurist.⁶ Furthermore, by covering the fields of international economic law, EU law, constitutional law and constitutionalism, among others, it also covers some of the fields of interest of *Ernst-Ulrich Petersmann* and *Petros Mavroidis*, my supervisor and internal advisor at the EUI, respectively. It can be argued that construing a constitution of international economic law has been one of *Petersmann's* aims throughout his entire academic career. This thesis, written by one of his supervisees, may be regarded as another step towards this goal. It is a large responsibility – and also a great pleasure – to continue the development of the ideals of rigor in research and of autonomy of thought that *Cappelletti*, *Petersmann* and *Mavroidis* have bequeathed us. These ideals represent schools of thought in legal sciences.

Efforts to combine the fields of trade regulation and human rights, which have been hotly debated over the last few years, are still by no means resolved. As will be explained in this work, the dispute settlement mechanisms of the MERCOSUR and the WTO have barriers that hinder this combination. This, nevertheless, does not mean that combining them is not possible.

1. Background

Some legal scholars, philosophers and sociologists defend the modification of the sort of legal system that basically focuses on justice and access to justice only at the level of Nation States. This group seeks a greater legal communication, the selection of the most suitable judicial and extra-judicial instruments for solving conflicts and changes

Mauro, *O controle judicial de constitucionalidade das leis no direito comparado* (translated by Aroldo Plinio Gonçalves), Porto Alegre, Sergio Antonio Fabris Editor, 1984; Cappelletti, Mauro/Garth, Bryant, *Acesso à Justiça*, Porto Alegre, Sergio Antonio Fabris Editor, 1988.

⁶ Indeed, EUI Professor Francesco Francioni has already published several works on access to justice, but none of them refers specifically to my field. Some of his works are Francioni, Francesco, *The Rights of Access to Justice under Customary International Law*, in: Francioni, Francesco (Ed.), *Access to Justice as a Human Right*, New York, Oxford University Press, 2007; Francioni, Francesco (Ed.), *Accesso alla Giustizia dell'Individuo nel Diritto Internazionale e dell'Unione Europea*, Milano, Giuffrè, 2008; and Francioni, Francesco, *Access to Justice, Denial of Justice, and International Investment Law*, in: Dupuy, Pierre-Marie (Ed.), *Human rights in international investment law and arbitration*, New York, Oxford University Press, 2009.

regarding access to justice at national, international and supranational levels.⁷ I agree with this group and would also add access to justice at the regional level, i.e. in blocs made of neighbouring countries that enter into an agreement, or a series of them, to improve regional cooperation, which usually starts in the trade area, but may also reach political, social and cultural objectives, whether directly or indirectly.⁸

With regard to trade, it is worth noting that it has, for centuries, occupied a privileged position in the economic development plans of governments, societies and States. In fact, trade is a practice that has been performed since the time before the birth of Jesus Christ. Long-range trade – which may have been the start of international trade – began with the Sumerians in Mesopotamia, the Harappan in the Indus Valley, and the Phoenicians. The great navigations towards the Orient and the Americas also had economic purposes, and European settlement was a later economic strategy. Today, while exporting means foreign exchange for a country, importing represents acquiring the goods that are necessary for consumers and for the primary, secondary and tertiary sectors of the national economy. Thus, in order to facilitate trade, States began to form economic blocs, which were designed for a free movement of goods.⁹

2. Focus of the thesis

I endeavour to explain in this thesis the problems of access to justice in multilevel trade regulation and how they may be managed – i.e., through a transnational constitutionalism approach. For this purpose, I intend to identify what access to justice and rule of law mean in the context of conflicts between the Brazilian,

⁷ E.g., Dworkin, Ronald, *O Império do Direito* (translated by Jefferson Luiz Carmargo), São Paulo, Martins Fontes, 1999; Habermas, Jürgen, *Direito e Democracia: entre Facticidade e Validade*, 2nd ed., Rio de Janeiro, Tempo Brasileiro, 2003; Faria, José Eduardo, *O Direito na Economia Globalizada*, São Paulo, Malheiros, 2004.

⁸ ‘Regionalism’ is a term that does not represent any substantive area of the law and only seldom appears in an openly normative shape. In foreign policy debates, it is a well-established theme (United Nations, *Fragmentation of international law: difficulties arising from the diversification and expansion of international law / report of the Study Group of the International Law Commission*, Helsinki, Erik Castrén Institute of International Law and Human Rights, 2007, p. 102). For the suggested distinct meanings of ‘regionalism’ in legal and political rhetoric, see pp. 103-114 of the book mentioned.

⁹ Long before the European Coal and Steel Community, in 1818 various Prussian and *Hohenzollern* territories established a *Zollverein* (customs union). The goal was to create a domestic market and an economic and commercial unification. After the foundation of the German Empire in 1871, the control of the *Zollverein* was assumed by the empire.

MERCOSUR and WTO jurisdictions. Since real legal practice in a society is a gradual process, the ‘legal scope’ of judicial decisions is particularly important to resolve disputes. What is meant by ‘legal scope’ of judicial decisions – namely national, regional, international, supranational and transnational – is a sort of ‘equalisation’ between the jurisdictional function (also known as ‘judicial function’ and ‘judicial role’), the interest of the parties involved (i.e., immediate legal reason) and the social interest in legal certainty and stability in the kind of relationship being judged (i.e., mediate legal reason).

3. Methodology

Overall, the methodology is normative and descriptive, and these approaches interact with each other. While it is normative because the thesis provides an account of what laws contain (i.e., an analysis of their legal field in a system of positive law) and how on some critical account they were meant to be, it is descriptive because it shows legal practice and the work of institutions, especially by taking case studies into account with the intention of enhancing the arguments with empirical information. There is, as a result, a balance of theoretical considerations and practical problems. In addition, there is also some degree of critical analysis, namely of whether positive laws and cases could not be interpreted in different ways. Some sections, nevertheless, involve different approaches that have been defined in order to clarify more complex topics that, as a consequence, deserve broader consideration.

It can also be said that the chapters provide a normative and descriptive historic analysis of the areas of law involved. Furthermore, legal philosophy also plays an important role in the normative methodology applied to interpret and reflect upon the meaning and legitimate purpose of certain legal principles,¹⁰ norms, and justice itself so that an organised and civic society, as well as rule of law, might be generated. Legal philosophy enquires about the nature of law through a critical dimension that includes the three fundamental questions of philosophy: practice, ontology and

¹⁰ Principles are rules that command that something is done in an extent that is as high as possible for the legal and factual possibilities. In the event of a collision of principles, a precise balance for the particular case has to be established. For details, see Alexy, Robert, *A Theory of Constitutional Rights* (translated by Julian Rivers), Oxford and New York, Oxford University Press, 2002.

epistemology. As *Roff* explains, neither *Plato's Republic* nor *Rousseau's ideal community* is easily achieved, but that does not mean that the prescriptions and requirements of either philosopher have no practicality.¹¹

This thesis employs legal texts, case law and scholarship in different languages and from different jurisdictions that are important to a comparative legal analysis of access to justice and trade regulation in Brazil, the MERCOSUR, the EU and the WTO. Besides sources in English, it relies on literature in the German, Portuguese and Spanish languages. Direct citations from literature and case law that are not in English and have no translation available have been translated by the author. Given that literal translations are not always possible and the reader may also want to read the original texts, the original wording of legal expressions, laws and case law in German, Portuguese and Spanish can be found in the text with an English translation in parentheses or is added in footnotes. In cases where clarifications were considered necessary, footnotes provide details on the meaning and interpretation of the original wording.

4. Structure of the thesis

To achieve the task of analysing the challenges concerning access to justice in multilevel trade regulation in Brazil, the MERCOSUR and the WTO, this thesis has 6 chapters, as follows: (I) access to justice, (II) access to justice in multilevel trade regulation, (III) Brazil, (IV) the MERCOSUR, (V) the WTO, and (VI) Final Conclusions.

5. Outline of the chapters

With the presentation of the topic of the thesis, its background, focus, methodology and structure in mind, this dissertation proceeds as follows. Chapter one defends the view that the right of access to justice has a fundamental meaning in legal science, it

¹¹ Roff, Heather M., *Global Justice, Kant and the Responsibility to Protect: a Provisional Duty*, New York, Routledge, 2013, p. 9.

presents itself as a *lex naturalis* and is, therefore, different from positive law or ‘man-made law’.¹² As well as the open character of the expression, several of the laws are also imprecise. Thus, judges can easily contribute towards a better understanding of what access to justice is, namely by developing the law.¹³

Chapter two argues that the international trading system has a *telos* that must remain directly linked not only to the WTO agreement but also to the Vienna Convention on the Law of Treaties (VCLT) and the UN Charter. As a result, human rights should always be coherently placed first because this is best for the international community and the environment of our planet as well as being closely linked to the rule of law. Concerning the relation between international trade law and human rights, although neither needs to be in opposition, they frequently are.¹⁴

Chapter three on access to justice in Brazil begins by tracing the historical development of access to justice in the different constitutional periods of the country. This is important because Brazil has undergone a series of revolutions, *coups d'état*, institutional ruptures and repressions, as well as different authoritarian and dictatorial regimes, which manifestly allowed governmental abuses of power and, as a result, affected a number of human rights, amongst others the right of access to justice. The chapter describes the manner in which the constitutional and infra-constitutional legislation is organised and the relationship between Brazilian constitutional law and international treaties. It also presents the organisation of the national judiciary, provides an overview of the role of judges in the country, non-State-owned means of dispute settlement (also known as alternative dispute settlement procedures) and Brazil's national and foreign trade regulation, besides an analysis of the crisis that the right of access to justice is experiencing in Brazil.

¹² Part of this chapter has been published in Staiger Schneider, Stefan, *State's Access to Justice in a Multilevel Legal World: the Brazil Tyres Cases Revisited*, in: Cremona, Marise/Hilpold, Peter/Lavranos, Nikos/Staiger Schneider, Stefan/Ziegler, Andreas R. (Eds.), *Reflections on the Constitutionalisation of International Economic Law: Liber Amicorum for Ernst-Ulrich Petersmann*, Leiden/Boston, Brill, 2014.

¹³ According to Lord Reid, developing the law is different from making it in the legislative sense. For details, see Finnis, John, *The Fairy Tale's Moral*, In: *Law Quarterly Review*, Vol. 115, 1999, pp. 170-173.

¹⁴ For details, see Marceau, Gabrielle, *WTO Dispute Settlement and Human Rights*, In: *13 European Journal of International Law*, 753, 757 et seq., 2002.

Chapter four focuses on the MERCOSUR. It examines the MERCOSUR's institutional framework, substantive law, and case law concerning disputes at national (Brazilian) and regional (MERCOSUR) levels. With a legal system that is based on an intergovernmental model that follows the classical perceptions of sovereignty and public international law, the MERCOSUR has been successful in increasing the economic integration of its region to a certain extent, but its economic success is not comparable to the success of the European Union and the North American Free Trade Agreement (NAFTA). In spite of this, it has been promoting peace, democracy, and stability since it was established in 1991. Access to justice and rule of law represent challenges which the chapter's conclusion attempts to demystify with due account of the MERCOSUR law and its dispute settlement system, the national legal system of Brazil and the role of its national judiciary. The conclusion also provides an overall assessment of what has been examined.

The final chapter five is about the WTO dimension of access to justice and examines the WTO dispute settlement system in light of the overall objectives of the WTO, its diplomatic ethos, power politics and which conception of rule of law should apply at WTO level. The chapter also presents multilevel case law analyses. The series of cases known as the *Brazil Tyres Cases* and the series of cases commonly called the *Poultry Cases* are examined with particular attention to the several problems related to the administration of justice that are faced by the Brazilian judiciary as well as MERCOSUR and WTO arbitral judges. The *Brazil Tyres Cases*¹⁵ are the only 3-level example of multilevel judicial trade regulation involving a MERCOSUR Member State – i.e., at the national, the regional and the global levels – and the *Poultry Cases* involve 2 levels, namely the regional and the global levels. The concluding remarks of every series of cases focus specifically on access to justice aspects.

¹⁵ The analysis of the *Brazil Tyres Cases* has also been published in Staiger Schneider, Stefan, *State's Access to Justice in a Multilevel Legal World: the Brazil Tyres Cases Revisited*, in: Cremona, Marise/Hilpold, Peter/Lavranos, Nikos/Staiger Schneider, Stefan/Ziegler, Andreas R. (Eds.), *Reflections on the Constitutionalisation of International Economic Law: Liber Amicorum for Ernst-Ulrich Petersmann*, Leiden/Boston, Brill, 2014.

Chapter I

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The Constitutional Dimension of Access to Justice

1. Introduction to Chapter I

This first chapter can be considered the cornerstone of the thesis. This is because access to justice is central for legal science and individuals, and is crucial for the purposes of the investigations of the following chapters. Here, I examine access to justice from two distinctive perspectives: human rights law and constitutional law. Then, I explore constitutionalism and clarify, in the chapter's conclusion, what my personal understanding of access to justice is.

Justice is more than simply *justicia est constans et perpetua voluntas jus suum cuique tribuendi*.¹⁶ It can be argued that the concept of justice can be characterised as 'social justice'.¹⁷ Gardner explains that Rawls uses the term 'social justice' in the sense that social institutions can "distribute fundamental rights and duties and determine the division of advantages from social cooperation".¹⁸ According to Kornfeld:

"In the final analysis, Rawls defines his concept of justice 'by the role of its principles in assigning rights and duties and in defining the appropriate division of social advantages'."¹⁹

In a few words, justice can be defined as the 'ought to be' of the law – i.e., the aim of the law should be justice, regardless the system in which the law has been created.

¹⁶ In English: 'Justice is the constant and perpetual desire to give to each one that to which he is entitled'.

¹⁷ For details, see Rawls, John, *A Theory of Justice*, Cambridge, The Belknap Press of Harvard University Press, 1999.

¹⁸ Gardner, John, *The Idea of Justice*, In: *Social Science Research Network Electronic Library Network*, 2012, p. 6, to be found at ssrn.com/abstract=2081682, accessed on 27th October 2013.

¹⁹ Kornfeld, Itzhak E., *Comment on Ernst-Ulrich Petersmann's 'The Judicial Task of Administering Justice in Trade and Investment Law and Adjudication'*, In: *Journal of International Dispute Settlement*, Vol. 4, Nr. 2, 2013, pp. 219-226 at p. 222. The author quotes Rawls, John, *A Theory of Justice*, Cambridge, The Belknap Press of Harvard University Press, 1999, pp. 8-9.

2. Access to Justice as a Human Right

Access to justice is not just about access to courts or simply a synonym of judicial protection, but it is itself a human right that involves other human rights recognised by the United Nations Universal Declaration of Human Rights.²⁰ In addition, other major human rights instruments at global and regional levels recognise the right of access to justice. Some examples are the Charter of the United Nations,²¹ the

²⁰ Art. 8 of the Universal Declaration of Human Rights defines that “Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.”

Art. 9. No one shall be subjected to arbitrary arrest, detention or exile.

Art. 10. Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.

Art. 11. (1) Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence. (2) No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed.

²¹ Art. 1. The Purposes of the United Nations are:

(1) To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace;

(2) To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace;

(3) To achieve international cooperation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion; and

(4) To be a center for harmonizing the actions of nations in the attainment of these common ends.

Art. 2. The Organization and its Members, in pursuit of the Purposes stated in Article 1, shall act in accordance with the following Principles:

(...)

(3) All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.

Art. 33. (1) The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.

(2) The Security Council shall, when it deems necessary, call upon the parties to settle their dispute by such means.

Art. 52. (1) Nothing in the present Charter precludes the existence of regional arrangements or agencies for dealing with such matters relating to the maintenance of international peace and security as are appropriate for regional action, provided that such arrangements or agencies and their activities are consistent with the Purposes and Principles of the United Nations.

(2) The Members of the United Nations entering into such arrangements or constituting such agencies shall make every effort to achieve pacific settlement of local disputes through such regional arrangements or by such regional agencies before referring them to the Security Council.

(3) The Security Council shall encourage the development of pacific settlement of local disputes through such regional arrangements or by such regional agencies either on the initiative of the states concerned or by reference from the Security Council.

International Covenant on Civil and Political Rights (ICCPR),²² the International Covenant on Economic, Social and Cultural Rights (ICESCR),²³ the European

Art. 76. The basic objectives of the trusteeship system, in accordance with the Purposes of the United Nations laid down in Article 1 of the present Charter, shall be:

(...)

(d) to ensure equal treatment in social, economic, and commercial matters for all Members of the United Nations and their nationals, and also equal treatment for the latter in the administration of justice, without prejudice to the attainment of the foregoing objectives and subject to the provisions of Article 80.

²² Art 14. (1) All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.

(2) Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.

(3) In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:

(a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;

(b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;

(c) To be tried without undue delay;

(d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;

(e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

(f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court;

(g) Not to be compelled to testify against himself or to confess guilt.

(4) In the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation.

(5) Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.

(6) When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.

(7) No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.

²³ Art. 1. (1) All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

(2) All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.

(3) The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.

Convention on Human Rights (ECHR),²⁴ the American Convention on Human Rights²⁵ and the African Charter on Human Rights and Peoples' Rights.²⁶ "In a more

Art. 2. (1) Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.

(2) The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

(3) Developing countries, with due regard to human rights and their national economy, may determine to what extent they would guarantee the economic rights recognized in the present Covenant to non-nationals.

Art. 3. The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights set forth in the present Covenant.

²⁴ Art. 6 (1) In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

(2) Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

(3) Everyone charged with a criminal offence has the following minimum rights:

(a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;

(b) to have adequate time and facilities for the preparation of his defence;

(c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;

(d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

(e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

Art. 13. Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.

²⁵ Art. 8. (1) Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature.

(2) Every person accused of a criminal offense has the right to be presumed innocent so long as his guilt has not been proven according to law. During the proceedings, every person is entitled, with full equality, to the following minimum guarantees:

a. the right of the accused to be assisted without charge by a translator or interpreter, if he does not understand or does not speak the language of the tribunal or court;

b. prior notification in detail to the accused of the charges against him;

c. adequate time and means for the preparation of his defense;

d. the right of the accused to defend himself personally or to be assisted by legal counsel of his own choosing, and to communicate freely and privately with his counsel;

e. the inalienable right to be assisted by counsel provided by the state, paid or not as the domestic law provides, if the accused does not defend himself personally or engage his own counsel within the time period established by law;

f. the right of the defense to examine witnesses present in the court and to obtain the appearance, as witnesses, of experts or other persons who may throw light on the facts;

g. the right not to be compelled to be a witness against himself or to plead guilty; and

h. the right to appeal the judgment to a higher court.

qualified meaning access to justice is used to signify the right of an individual not only to enter a court of law, but also to have his or her case heard and adjudicated in accordance with substantive standards of fairness and justice.”²⁷ The same author advocates a judicial approach that takes into account the essential role of access to justice as a guarantee of the effective enjoyment of human rights in a society based upon the rule of law and on the availability of effective remedies against the abuse of power. *Cottier and Hertig* argue that “(i)nternational instruments for the protection of human rights (...) were set up as minimal safeguards for the citizens against the failure and abuse of state power”.²⁸

But what does rule of law mean? There are several broad definitions for rule of law.²⁹

(3) A confession of guilt by the accused shall be valid only if it is made without coercion of any kind.

(4) An accused person acquitted by a nonappealable judgment shall not be subjected to a new trial for the same cause.

(5) Criminal proceedings shall be public, except insofar as may be necessary to protect the interests of justice.

Art. 25. (1) Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties.

(2) The States Parties undertake:

a. to ensure that any person claiming such remedy shall have his rights determined by the competent authority provided for by the legal system of the state;

b. to develop the possibilities of judicial remedy; and

c. to ensure that the competent authorities shall enforce such remedies when granted.

²⁶ Art. 7. (1) Every individual shall have the right to have his cause heard. This comprises:

a. The right to an appeal to competent national organs against acts of violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force;

b. The right to be presumed innocent until proved guilty by a competent court or tribunal;

c. The right to defence, including the right to be defended by counsel of his choice;

d. The right to be tried within a reasonable time by an impartial court or tribunal.

(2) No one may be condemned for an act or omission which did not constitute a legally punishable offence at the time it was committed. No penalty may be inflicted for an offence for which no provision was made at the time it was committed. Punishment is personal and can be imposed only on the offender.

Art. 25. State Parties to the present Charter shall have the duty to promote and ensure through teaching, education and publication, the respect of the rights and freedoms contained in the present Charter and to see to it that these freedoms and rights as well as corresponding obligations and duties are understood.

Art. 26. State Parties to the present Charter shall have the duty to guarantee the independence of the Courts and shall allow the establishment and improvement of appropriate national institutions entrusted with the promotion and protection of the rights and freedoms guaranteed by the present Charter.

²⁷ Francioni, Francesco, *The Right of Access to Justice under Customary International Law*, In: Francioni, Francesco (Ed.), *Access to Justice as a Human Right*, New York, 2007, p. 1.

²⁸ Cottier, Thomas/Hertig, Maya, *The Prospects of 21st Century Constitutionalism*, in: Bogdandy, Armin v./Wolfrum, Rüdiger, *Max Planck Yearbook of United Nations Law*, Vol. 7 (2003), Leiden/Boston, Brill, 2004, p. 267.

²⁹ A generic concept of rule of law can be identified in the 1789 Declaration of the Rights of Man and of the Citizen. According to its Art. XVI, “a society in which the observance of the law is not assured,

The definition of the former UN Secretary-General Kofi Annan is perhaps one of the most succinct and precise:

“The ‘rule of law’ [...] refers to a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.”³⁰

nor the separation of powers defined, has no constitution at all”. The wording presents two key elements of rule of Law, namely the separation of powers and the respect for fundamental rights.

In continental Europe, *Immanuel Kant* is known as the philosophical author of the concept of *Rechtsstaat* (the continental “version” of rule of law), but the expression was firstly used by *Robert von Mohl* in his book *Die deutsche Polizeiwissenschaft nach den Grundsätzen des Rechtsstaates* (1st ed., Tübingen, 1834). The theoretic bases behind *von Mohl*’s expression were rationalist *lex naturalis*, contractualism (i.e., social contract), democratic freedom and humanism (Julios-Campuzano, Alfonso, *Constitucionalismo em Tempos de Globalização*, Porto Alegre, 2009, p. 10).

Kant was also the first to extend the conception of rule of law to international law (Petersmann, Ernst-Ulrich, *Administration of Justice in the World Trade Organization: Did the WTO Appellate Body Commit ‘Grave Injustice’?*, in: EUI Working Papers, *Multilevel Judicial Governance Between Global and Regional Economic Integration Systems: Institutional and Substantive Aspects*, Florence, European University Institute, 2009, p. 56).

The *Rechtsstaat* has formal and substantive elements. Among the formal ones, the concept of *Rechtsstaat* encompasses the principles of legality, legal certainty, predictability, proportionality, the prohibition on retroactive laws, judicial review (particularly judicial review for breach of constitutional rights), etc. (the list is not exhaustive). In regard to the substantive elements, *Rechtsstaat* is also understood to include the principle of fundamental rights protection, which is in fact more than just a component of the *Rechtsstaat*.

Wennerström explains, however, that, while the concept of rule of law emerged from courtrooms, the concept of *Rechtsstaat* emerged from written constitutions and was defined in opposition to absolutist States (Wennerström, Erik O., *The Rule of Law and the European Union*, Uppsala, Iustus Förlag, 2007, p. 50). According to the same author, the protection against absolutism should come from the legislature rather than only from courtrooms.

The scope of application of the rule of law principle in the legal tradition of every country and its evolution should also be historically understood. Thus, even if it is possible to derive a common conception of the rule of law from different constitutional traditions, it will keep being possible to interpret and implement this principle in different ways.

³⁰ Annan, Kofi, *The rule of law and transitional justice in conflict and post-conflict societies*, Report of the Secretary-General, Doc. S/2004/616, 23 August 2004, paragraph 6, quoted in European Commission for Democracy through Law (Venice Commission), *Report on the Rule of Law*, Venice, 2011, p. 6.

The conclusion of the report on the rule of law that has been developed by the European Commission for Democracy through Law (Venice Commission) is that the definition of the concept of rule of law has a major deficiency: legal provisions referring to it at national and international levels are very general. While on the one hand this problem calls into question the usefulness of the rule of law concept, on the other hand the expression has been included in national and international legal texts as well as case law.³¹ Therefore, the commission responsible for the report does believe that the rule of law is “a fundamental and common European standard to guide and constrain the exercise of democratic power”.³²

Some countries made important contributions to the universalisation of rights, among which human rights. Some of the most outstanding documents were the English *Magna Carta* of 1215,³³ the U.S. Constitution of 1787 and the Declaration of the Rights of Man and of the Citizen of 1789 in France. At the international level, one should note the Universal Declaration of Human Rights of 1948, which has already been mentioned above, the Inter-American treaties and pacts, and the law of the European Communities and European Union. *Trindade* explains that:

“the right to an effective remedy before competent national judges or tribunals in the American Declaration (Article XVIII) was transplanted to the Universal Declaration of Human Rights (of December 1948, Article 8), and from this latter to the European and American Conventions on Human Rights (Articles 13 and 25, respectively), as well as to the U.N. Covenant on Civil and Political Rights (Article 2(3)).”³⁴

³¹ European Commission for Democracy Through Law (Venice Commission), *Report on the Rule of Law*, Venice, 2011, p. 14.

³² *Ibid.*

³³ Clause 39 of it is still in force today. It says:

“No Freeman shall be taken or imprisoned, or be disseised of his Freehold, or Liberties, or free Customs, or be outlawed, or exiled, or any other wise destroyed; nor will We not pass upon him, nor condemn him, but by lawful judgment of his Peers, or by the Law of the land. We will sell to no man, we will not deny or defer to any man either Justice or Right.”

³⁴ Trindade, Antônio A. C., *The Access of Individuals to International Justice*, Oxford, New York, 2011, p. 54.

International norms express the internationalisation of rights and, when they are incorporated by national legal systems, they also become capable of transforming the interpretation and application conjunctures of the remaining national rights.³⁵ States are nowadays locked and bound by several treaties that also define external relations.³⁶

The judiciary was created to state the law to specific cases. Persons should ‘have the right’³⁷ to seek remedies before ‘courts and tribunals’,³⁸ and expect them to act independently from the Executive Power and impartially apply the law. While judicial independence means that the Judiciary Power is not controlled, influenced or manipulated by governmental branches (i.e., in accordance with the principle of the separation of powers) and is free of external pressure,³⁹ impartiality means that the outcomes of cases do not prejudice the judiciary.⁴⁰ This understanding is based on the concept of the rule of law. Access to justice also comprises the existence of the necessary legal means during the judicial proceedings – i.e., from the filing of the suit until the trial – so that it can effectively generate individually and socially just results.

Therefore, the right of access to justice must involve several procedural rights, which, if absent, withdraw the existence of a right of access to justice. Still with regard to the procedural aspects, *Weiler* summarises that “[a]ccess to justice is concerned with the need to transform formal rights into effective rights.”⁴¹ Thus, competent fora to file suits must exist. Furthermore, the time to file them cannot be too short, otherwise the regular exercise of rights will be endangered.

For *Roff*, the responsibility to protect:

³⁵ Hess, Heliana M. C., *Acesso à justiça por reformas judiciais*, Campinas, 2004, p. 14.

³⁶ Cottier, Thomas/Hertig, Maya, p. 268.

³⁷ *Feinberg* has a conclusive definition of what ‘to have a right’ means: “To have a right is to have a claim against someone whose recognition as valid is called for by some set of governing rules or moral principles” (Feinberg, Joel, *Rights, Justice and the Bounds of Liberty: Essays in Social Philosophy*, Princeton, Princeton University Press, 1980, p. 155).

³⁸ The expression ‘courts and tribunals’ is applied in a generic way and covers all kinds of courts (national and international), tribunals, arbitral tribunals and court-like bodies that are permanent, semi-permanent and *Ad Hoc*).

³⁹ *Report on the Rule of Law*, p. 12.

⁴⁰ *Ibid.*, p. 12.

⁴¹ Weiler, Joseph H. H., *Supranational law and the supranational system: Legal structure and political process in the European Community*, Ph.D. thesis, Law Department of the European University Institute, Florence, 1982, p. 500.

“must first and foremost be understood as a moral and legal duty, and once we grant it this status we can begin the processes of building the requisite juridical institutions to provide the particulars the duty.”⁴²

*Petersmann*⁴³ stresses that the impartial and independent judge applying rules of law in fair procedures so as to peacefully settle disputes belongs to the oldest paradigms of justice, as illustrated by the instructions in the Old Testament to set up courts of law⁴⁴ as well as by judicial settlement of disputes in Greek city republics,⁴⁵ inspired by much older ideals of judicial dispute settlement as discussed in ancient Athenian tragic drama.

According to *Corstens*,⁴⁶ human rights are especially felt in a national court when the national law, including the national constitution, is in compliance with international human rights instruments.⁴⁷

With regard to access to justice at the international level, *Francioni*⁴⁸ reminds that, according to the orthodox positivist view, international law is a system of law governing Inter-State relations, in which only States have ‘rights’ and ‘obligations’, including the right to bring a claim before a court or arbitral tribunal. Today, while the International Court of Justice (ICJ) is open only to States,⁴⁹ the dispute settlement system of the World Trade Organization (WTO) accepts States and customs territories that have full autonomy to conduct trade policies.

⁴² Roff. Heather M., p. 1.

⁴³ Petersmann, Ernst-Ulrich, *Administration of Justice in the World Trade Organization: Did the WTO Appellate Body Commit ‘Grave Injustice’?*, in: EUI Working Papers, *Multilevel Judicial Governance Between Global and Regional Economic Integration Systems: Institutional and Substantive Aspects*, Florence, European University Institute, 2009, p. 45.

⁴⁴ ‘Justice, and justice alone, you shall pursue’.

⁴⁵ E.g. in the court of *Areopagus* in ancient Athens.

⁴⁶ Geert Corstens is the current President of the Supreme Court of the Netherlands and President of the Network of the Presidents of the Supreme Judicial Courts of the European Union.

⁴⁷ Part of *Corstens*’ speech in his lecture ‘*Human Rights and the Rule of Law*’, which was organised by the Centre for Judicial Cooperation of the Department of Law of the European University Institute. The lecture took place on 24th October 2013 at the European University Institute in Florence, Italy.

⁴⁸ Francioni, p. 5.

⁴⁹ International Court of Justice Statute, Art. 34(1): Only States may be parties in cases before the Court.

*Comparato*⁵⁰ defines international access to justice⁵¹ in a way that I find very convincing. According to him, it is a suprapositive right towards rationality ideals and social pacification of conflicts between States, and he considers it appropriate to solve conflicts that may arise in pluralistic, democratic and culturally differentiated societies. In order to understand what the author means requires an understanding of the meaning of ‘suprapositive rights’. Is a suprapositive right that natural right (i.e., *ius naturale*) of human dignity, which is sought by some international bodies through their abstract statements? This question is important because human rights should not be confused with fundamental rights. While the latter should be viewed as legal and positivated rights arising from a constitutional order (i.e., *lex posita*), the former go beyond the political institutionalisation of a Nation State, being the result of a *lex naturalis* dimension and are, as a consequence, universalist. In other words, while fundamental rights have temporal and territorial limitations due to their formal recognition (i.e., *lex posita*), human rights have neither temporal nor territorial limitations. *Bachof* offers a different interpretation. For him, there is a ‘supralegal law’, which is composed of ‘norms’ that precede the existence of the State.⁵² These norms, according to the author, do not relate solely to the natural rights of individuals.⁵³ For *Bachof*, who also quotes *Mallmann*, the legislator of the German Basic Law incorporated supralegal law into its text, especially in Articles 1,⁵⁴ 3,⁵⁵ 20 (3),⁵⁶ and 25,⁵⁷ when it incorporated metaphysical values into the constitution. Hence,

⁵⁰ Comparato, Fábio Konder, *O Papel do Juiz na Efetivação dos Direitos Humanos*, In: *Direitos Humanos, Visões Contemporâneas, Associação Juizes para a Democracia, 10 anos*, São Paulo, 2001, p. 17, quoted in Hess, p. 27.

⁵¹ Perhaps, ‘transnational access to justice’ would be a better expression.

⁵² One should not forget that the Federal Republic of Germany and its Basic Law were created after the creation of the United Nations and the Universal Declaration of Human Rights. In this context, therefore, norms of the UN preceded the existence of the Federal Republic of Germany.

⁵³ For details, see Bachof, Otto, *Normas Constitucionais Inconstitucionais?* (translated by José Manuel M. Cardoso da Costa), Atlântida Editora, Coimbra, 1977, p. 40 ff.

⁵⁴ Art. 1 [Human dignity – Human rights – Legally binding force of basic rights]

(1) Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority.

(2) The German people therefore acknowledge inviolable and inalienable human rights as the basis of every community, of peace and of justice in the world.

(3) The following basic rights shall bind the legislature, the executive and the judiciary as directly applicable law.

⁵⁵ Art. 3 [Equality before the law]

(1) All persons shall be equal before the law.

(2) Men and women shall have equal rights. The state shall promote the actual implementation of equal rights for women and men and take steps to eliminate disadvantages that now exist.

(3) No person shall be favoured or disfavoured because of sex, parentage, race, language, homeland and origin, faith, or religious or political opinions. No person shall be disfavoured because of disability.

⁵⁶ Art. 20 [Constitutional principles – Right of resistance]

(...)

the legislator recognised supralegal law as valid, because it has been positivated.⁵⁸ Also according to the same author, the material concept of a constitution presumes that natural law is taken into account.

Back to the topic of access to justice, I consider it important to highlight that it has been recognised in national legal systems, international treaties and pacts, and also supranationally by the European Union. *Comparato*⁵⁹ argues that access to justice became a supranational fundamental right. For me, *Comparato*'s arguments make full sense. Nevertheless, I wonder if judges and law professionals of non-EU Members States agree with him, because there are numerous countries – Brazil, for example – that have constitutional obstacles to both the implementation and the enforcement of international law as well as the creation of possible supranational institutions with decision-making power.⁶⁰

Notwithstanding the above, it can be argued that before its positivation in national, international and supranational legal systems, access to justice has been *lex naturalis* and, accordingly, inherent to the human being like life, dignity and liberty. But can the WTO dispute settlement body apply *lex naturalis*? It can and has indeed already applied. *Weiler*⁶¹ provides some examples: the principles of *Nemo Iudex in Propria Causa*,⁶² *Audi Alteram Partem*,⁶³ fairness and openness. The fact that there have already been extensive references in several reports to these and other examples that are not referenced in the VCLT⁶⁴ allows one to conclude that *lex naturalis* may also be acknowledged as legally important to the WTO legal order. Furthermore, it can be argued that the DSB has no pre-established barriers to apply *lex naturalis*.

(3) The legislature shall be bound by the constitutional order, the executive and the judiciary by law and justice.

⁵⁷ Art. 25 [Primacy of international law]

The general rules of international law shall be an integral part of federal law. They shall take precedence over the laws and directly create rights and duties for the inhabitants of the federal territory.

⁵⁸ Bachof, Otto, p. 41.

⁵⁹ Comparato, Fábio Konder, 2001, p. 17, quoted in Hess, p. 27.

⁶⁰ For details concerning Brazil, see the section of this thesis named "Brazilian Constitutional Law and International Treaties".

⁶¹ Weiler, Joseph H.H., *The Rule of Lawyers and the Ethos of Diplomats: Reflections on the Internal and External Legitimacy of WTO Dispute Settlement*, in: Harvard Law School, *Harvard Jean Monnet Working Paper 9/00*, Cambridge, 2000, p. 9.

⁶² 'No person can judge a case in which he or she is party'.

⁶³ 'All parties must be heard.'

⁶⁴ Mavroidis, Petros C., *No Outsourcing of Law? WTO Law as Practiced by WTO Courts*, in: *The American Journal of International Law*, Vol. 102, Nr. 3, July 2008, p. 436.

With regard to supranationality, it is worth pointing out that it is a concept that was born, in doctrinal terms, with the Schuman Declaration of 9th May 1950, the Treaty of Paris of 18th April 1951⁶⁵ and, consequently, the European Coal and Steel Community (ECSC). One of the ECSC distinguishing features is the fact that its Member States – i.e., Belgium, France, West Germany, Italy, Luxembourg and the Netherlands – delegated the administration of a common economic sector to a community of countries. The characteristics that the ECSC adopted thereafter transformed it into a supranational organisation with principles, administration and jurisdiction that were diverse from the national orders.⁶⁶ As a general rule, an organisation has a supranational character when there are powers that stand above States and result from the transfer of some functions that are inherent to States.⁶⁷ The interests of a supranational organisation are communitarian rather than intergovernmental. This brings to the fore *Kerber*,⁶⁸ who considers that supranational organisations should, *inter alia*, regulate much more than trade but also: peace, the preservation of human rights and the very culture of the peoples, the protection of the environment, visa policies, illegal migration, economic development and consumer rights, besides combating organised crime.

Nowadays, access to justice at the international level continues to be limited to systems of treaties in which breaches of human rights by contracting States fall within the scope of review of a judicial or quasi-judicial body empowered to hear individual

⁶⁵ Treaty of Paris, Art. 9, paragraph 5: The members of the High Authority shall exercise their functions in complete independence, in the general interest of the Community. In the fulfilment of their duties, they shall neither solicit nor accept instructions from any government or from any organization. They will abstain from all conduct incompatible with the supranational character of their functions. Treaty of Paris, Art. 9, paragraph 6: Each member State agrees to respect this supranational character and to make no effort to influence the members of the High Authority in the execution of their duties.

⁶⁶ Ventura, Deisy, *A ordem jurídica comunitária no Mercosul: possibilidades de constituição e eficácia* (Master's thesis in Latin American Integration – MILA, Universidade Federal de Santa Maria – UFSM), Santa Maria, 1996, pp. 15-18, quoted in Zanoto, Josianne, *A funcionalidade do tribunal permanente de revisão do Mercosul: entre o Órgão de Apelação da Organização Mundial do Comércio e o Tribunal de Justiça das Comunidades Européias* (Master's thesis in Latin American Integration – MILA, Universidade Federal de Santa Maria – UFSM), Santa Maria, 2006, p. 22.

⁶⁷ Medeiros, Antonio Paulo Cachapuz de, *Tribunais supranacionais e aplicação do direito comunitário: aspectos positivos e negativos*, In: Ventura, Deisy (Ed.), *Direito comunitário do Mercosul*, Porto Alegre, 1997, p. 164.

⁶⁸ Jaeger Junior, Augusto, *Apresentação do livro 'Mercosul e a Supranacionalidade', de Gilberto Kerber*, in: Jaeger Junior, Augusto, *Temas de Direito da Integração e Comunitário*, Editora LTr, São Paulo, 2002, p. 260. This author comments on the book of Gilberto Kerber entitled *Mercosul e a Supranacionalidade* (Editora LTr, São Paulo, 2001).

complaints.⁶⁹ *Trindade*⁷⁰ explains that the individual's access to justice at the international level has been discussed by the Inter-American Court of Human Rights (IACtHR) with regard to:

“both to the right of individual petition under the American Convention as well as the conditions of admissibility of individual complaints. In the case of *Castillo Petruzzi and Others versus Peru* (Preliminary Objections, 1998), the court upheld the right of individual petition (challenged by the respondent State) under the American Convention (Article 44). It drew attention to the importance of that right, observing that the broad faculty ‘to make a complaint is a characteristic feature of the system for the international protection of human rights’ (par. 77). In my Concurring Opinion, I pondered that the right of individual petition rendered the protected rights effective, and thus constituted ‘a fundamental clause (*cláusula pétrea*)’ upon which was erected ‘the juridical mechanism of emancipation of the human being vis-à-vis his own State for the protection of his rights in the ambit of the International Law of Human Rights’.”⁷¹

Concerning the right to effective domestic remedies, the IACtHR approached this for the first time under Art. 25 of the American Convention on Human Rights⁷² in the judgement of *Castillo Paéz versus Peru* (1997). In earlier cases – e.g., *Caballero Delgado and Santana versus Colombia* (1995) and *Genie Lacayo versus Nicaragua* (1997) – the court:

⁶⁹ Francioni, p. 55.

⁷⁰ *Antônio Augusto Cançado Trindade* is a former president and judge of the Inter-American Court of Human Rights and is currently a judge of the International Court of Justice.

⁷¹ Trindade, Antônio A. C., *The Access of Individuals to International Justice*, Oxford, New York, 2011, p. 51. The author quotes paragraphs 35 and 36 of his Concurring Opinion in the case *Castillo Petruzzi and Others versus Peru* (Preliminary Objections, 1998).

⁷² Article 25. Right to Judicial Protection. 1. Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties.

2. The States Parties undertake:

- a. to ensure that any person claiming such remedy shall have his rights determined by the competent authority provided for by the legal system of the state;
- b. to develop the possibilities of judicial remedy; and
- c. to ensure that the competent authorities shall enforce such remedies when granted.

“had summarily disposed of the matter, on the basis of the test of the *availability*, rather than of the *adequacy* and *effectiveness*, of domestic remedies. In this way, no violation was established in those earlier cases of the State’s duty to provide effective local remedies under Article 25 of the Convention. This view, however, did not pass unchallenged. A Dissenting Opinion was expressed to the effect that Article 25 was a provision far more important than one might *prima facie* assume, as the right to an effective remedy before competent national tribunals constituted a basic pillar not only of the Convention but of the rule of law itself in a democratic society, and its correct application had the sense of improving the administration of justice at national level. The dissent further recalled the Latin American origin of that provision (cf. *infra*). IACtHR, case *Genie Lacayo versus Nicaragua* (revision of sentence, 1997), Dissenting Opinion of Judge A.A. Cançado Trindade (pars. 18-21); and cf. case *Caballero Delgado and Santana versus Colombia* (reparations, 1997), Dissenting Opinion of Judge A.A. Cançado Trindade (pars. 2-3).”⁷³

For the IACtHR, Art. 25 “constitutes one of the basic pillars, not only of the American Convention, but of the rule of law (*État de Droit, Estado de Derecho*) itself in a democratic society in the sense of the Convention”.⁷⁴ In the judgement of the case of the *Massacre of Pueblo Bello* (31st January 2006), concerning Colombia, the IACtHR went further and stated that:

“the action or omission of any public authority constitutes a fact imputable to State, which engages its international responsibility in the terms foreseen by the Convention itself and in accordance with general international law.”⁷⁵

⁷³ Trindade, Antônio A. C., *The Access of Individuals to International Justice*, Oxford, New York, 2011, p. 51 (footnote 5).

⁷⁴ Paragraph 82 of the judgement in the *Castillo Paéz versus Peru* case (1997), quoted in Trindade, p. 52.

⁷⁵ Paragraph 112 of the judgement in the *Massacre of Pueblo Bello* case (2006), quoted in Trindade, p. 52.

At national level, States must make available the necessary remedies for persons to obtain judicial protection concerning trade and customs issues. Furthermore, access to justice in national law is a prerequisite for access to justice in international law.⁷⁶

Francioni explains that this is because:

“human organization is modelled on the pattern of sovereign States, and human beings continue to be subject to State authority and national jurisdiction”.⁷⁷

So, the right of access to justice has to be primarily ensured at national level. Yet, over half of the world’s Nation States violate the rights of their peoples.⁷⁸

Besides, while at the international level there is a narrow limitation of access to justice in human rights conventions, at the national level access to justice depends on the law, legal traditions and reasonableness of courts of every Nation State. Thus, it is necessary to root human rights in all fields of law and to expand access to justice beyond human rights law in order to protect citizens against abuses of power. Yet, most national governments continue to be opportunists and their executive branches remain power oriented.

At the international level, an international legal infrastructure for the rule of law is developing alongside economic globalisation. In view of that, it is important to understand what economic globalisation is. The phenomenon of globalisation can be divided into various different dimensions, namely: (a) economic, (b) political and (c) military/security.⁷⁹ Economic globalisation means the globalisation of production, distribution, management, trade and finance.⁸⁰ The expansion and globalisation of

⁷⁶ Francioni, p. 7.

⁷⁷ Francioni, p. 8. He also cites Cassese, Antonio, *Individuo (dir. internazionale)*, In: *Enciclopedia del Diritto*, Vol. XXI, Milano, 1971, p. 184 and 189; and Strozzi, Girolamo, *Interessi Statali e Interessi Privati Nell’ordinamento internazionale: la funzione del previo esaurimento dei ricorsi interni*, Milano, 1977, p. 114.

⁷⁸ For details, see Roff, Heather M., p. 87 ff.

⁷⁹ For details on these dimensions, see Göksel, Nilüfer K., *Globalisation and the State*, in: *Perceptions Journal of International Affairs*, Vol. 9, Nr. 1, 2004, p. 3 ff, which can be found at <http://sam.gov.tr/wp-content/uploads/2012/02/1.-NiluferKaracasuluGoksel.pdf>. Date of access: 26th March 2014.

⁸⁰ *Ibid.* The author quotes Sorenson, George, *IR Theory after the Cold War*, in: *Review of International Studies*, Vol. 24, Issue 5, 1998, pp. 83-100.

these sectors has not only created a global market for several goods but also a global market for several services, increasing, as a consequence, competition and diminishing the control of Nation States. National governments have less influence over some activities in their own territories, namely in terms of trade, services, their economies and internal markets, and the spread of information and technology.⁸¹

At EU level, as an outcome of the European integration, the national constitutions of the Member States became limited and might be defined as what *Petersmann* calls ‘partial constitutions’,⁸² because they are no longer able to unilaterally ensure all the demands of their citizens. Outside the EU, nevertheless, a large number of countries continue to focus on intergovernmental politics and ‘constitutional nationalism’.⁸³ So, the reality of public international law outside the EU is still a coercive order that respects state sovereignty over both national affairs and domestic and international legal systems.⁸⁴ Moreover, in powerful non-EU countries, *Realpolitik* remains a predictable mainstay of international law.⁸⁵

According to *Jeremy Waldron*, the aims of international rule of law are:

“to protect us (or whoever) against certain abuses that may arise out of law itself, whether it is associated with governmental/state power or not. Raz says that “[t]he law inevitably creates a great danger of arbitrary power” and that “the rule of law is designed to minimize the danger created by the law itself.” I have never been entirely happy with this formulation (footnote omitted). It is certainly not the whole point of the ROL, and Raz’s position is inadequate if it neglects the point that – at least in the national context – the ROL aims primarily not to defend us against law as such but to defend us against governmental power by insisting that governmental power be more law-like and exercised through proper legal channels. Still, to the extent that there is anything in Raz’s point, we might say that it is at least part of the

⁸¹ *Ibid.*, pp. 4 and 11.

⁸² *Petersmann*, 2009, p. 65.

⁸³ *Ibid.*

⁸⁴ *Petersmann*, 2009, p. 64.

⁸⁵ E.g., North Korea, China and the United States.

purpose of the ROL in the international realm to protect the subjects of IL from dangers created by IL itself.”⁸⁶

But, if States exist for the sake of their citizens and not the other way around, international law exists for the sake of billions of natural and legal persons.⁸⁷ The well-being of these persons is the ultimate end of international law. Thus, since most international norms apply first to national governments and any rule of law constraints on those norms or how they are administered are firstly for the benefit of governments, persons whom they rule or whose well-being and rights are ultimately affected may or may not be benefited.⁸⁸

This brings us to the definitions of what ‘denial of justice’ and ‘denial of access to justice’ actually entail. In his book, *Francioni* places the first one in the section that relates to the treatment of aliens and their access to domestic justice, but I believe that it should not be restricted to that issue. Here is the first definition:

“Denial of justice exists when there is a denial, unwarranted delay or obstruction of access to courts, gross deficiency in the administration of judicial and remedial process, failure to provide those guarantees which are generally considered indispensable to the proper administration of justice, or a manifestly unjust judgment. An error of a national court which does not produce manifest injustice is not a denial of justice.”⁸⁹

The second definition says that restrictions on access to justice exist when the law of a particular State provides for a general exclusion, or certain modalities, of suits under certain circumstances or in relation to a certain class of persons⁹⁰. There was a case in

⁸⁶ Waldron, Jeremy, *Are Sovereigns Entitled to the Benefit of the International Rule of Law?*, in: New York University, *International Law and Justice Working Paper 2009/3* finalized on 04/03/09, New York, 2009, p. 8. The author uses the expression ‘ROL’ for ‘rule of law’.

⁸⁷ Legal persons too, because they were established by natural persons, who are liable for them up to a certain degree, which depends on the kind of legal personality and the legislation that regulates its functioning.

⁸⁸ Waldron, p. 11.

⁸⁹ Art. 9 of the Harvard Draft on state responsibility for injuries to aliens, quoted in Francioni, Francesco, p. 11.

⁹⁰ Francioni, p. 39.

the MERCOSUR, namely in Argentina,⁹¹ which illustrates well the restrictions to access to justice. However, since Argentina is not the focus of this thesis, please refer to the footnote for details.⁹²

As a consequence, one can see that what characterises ‘denial of access to justice’ are restrictions or exclusions imposed by the State through substantive and procedural law. A similar understanding is also applicable to international organisations, as they define, restrict and exclude rights and who is entitled to them. Two among many examples are the MERCOSUR and the WTO. The right of access to justice has to be preserved in all its dimensions, ensuring greater compliance with the principle of human dignity.

So, the next issue to think about is the scope of rule of law, given that human rights and rule of law have a close relationship. In dualist countries like Brazil, the rule of international law does not, in principle, have legal effect in the national legal order

⁹¹ CNCom., *Turma B*, “*Mochon, César R./Delibano Elorrieta, Norma M.*”, s/Sumário, *expte. Nr. 34.696/02* of 17th March 2003.

⁹² In Argentina, the *Cámara Nacional de Apelación en lo Comercial* (“National Chamber of Appeals in Commercial Matters” in English) confirmed a decision of the lower instance and, therefore, rejected the objection raised by the defendants in the warranty. In this case, the Protocol of Las Leñas on judicial cooperation and assistance in civil, commercial, labour and administrative matters (Mercosur Council decision Nr. 5/92) has been applied *ex officio*. The subject-matter of the dispute was a claim for payment made in Punta del Este, in Uruguay, by an Argentine citizen against another Argentine citizen. The claimant was a resident of Uruguay and the defendant a resident of Argentina. In the trial, the defendant claimed that the Hague Convention on Civil Procedure of March 1954 (implemented in Argentina through law Nr. 23,502/87 and in force since 9th July 1988) was not applicable because the Republic of Uruguay was not a signatory state, and demanded that the plaintiff files a bond in court for the costs of the proceedings, since he was neither a resident nor had Assets in Argentina, which is in accordance with what is foreseen in Article 348 of the Argentine Civil and Commercial Procedural Code, and is similar to the old version of § 110 of the German Code of Civil Procedure (for details, see Stein, Friedrich/Jonas, Martin, *Kommentar zur Zivilprozessordnung*, 22nd ed., Vol. 2, Tübingen, 2004, p. 658), which has been repeatedly criticized by the ECJ as it violated both the non-discrimination rule of Article 6 of the EC Treaty and Article 4 of the European Economic Area Agreement, which was signed in 1993 (for details on the subject in the present text of the German Code of Civil Procedure, which is in force since 1st October 1998, see *Neue Juristische Wochenschrift* 1993, 2431; 1996, 3407; 1997, 3299; 1998, 2127).

Both the court of first instance and the National Chamber of Appeals in Commercial Matters of Argentina rejected an obligation of the plaintiff to file a bond in court for the costs of the proceedings. The court of appeals based its decision on the right to “equality of procedural treatment”, which is provided in Articles 3 and 4 of the Protocol of Las Leñas. Article 3 stipulates that citizens and permanent residents of any Mercosur Member State shall enjoy access to justice to defend their rights and interests in any Member State on the same terms as citizens and permanent residents of any other Member State. Article 4 also provides that no bond for the costs of the proceedings, deposit or the name it might have shall be imposed for the reason that a person is a citizen or permanent resident of another Member State.

The request of advance payment of charges, fees and bonds by the claimant simply because he is a permanent resident of Uruguay is, thereby, prohibited.

without a national law rule that allows it.⁹³ As a result, the rule of international law depends on national organs in order to become effective in domestic legal orders. Thus, there must be a connection between international and national legal orders and, accordingly, international and national rule of law. This becomes even clearer in the words of *Nollkaemper*:

“in virtually all fields of international law, compliance with international law is not possible without a meaningful connection to the domestic arena. That is obvious for all those areas in which international law substantively deals with the same issues as domestic law (fundamental rights, the environment, criminal law, etc) and domestic laws must reflect international law.”⁹⁴

Hence, one may argue that the same understanding also applies to trade law issues, as trade law is dealt with both by national and international law. This becomes even more evident if one considers freedom of trade as a fundamental right.⁹⁵ Concerning the specific relation between international trade law and rule of law, *Maduro* believes that it should be based on:

“a notion of constitutionalism based on non-discrimination, individual rights (mainly economic rights) and dispute settlement mechanisms. The expectation is that these instances will develop into a set of individual constitutional rights protected at the global level from any form of power. The dynamics of international trade will fuel the development of an international rule of law through these economic rights and dispute settlement mechanisms.”⁹⁶

⁹³ For details, see the section ‘Brazilian Constitutional Law and International Treaties’, which can be found in the chapter ‘The Brazilian Dimension of Access to Justice’, of this thesis.

⁹⁴ Nollkaemper, André, *National Courts and the International Rule of Law*, New York, 2011, p. 301.

⁹⁵ For the issue regarding market freedom as a fundamental right, see Chapter II, section 2, item ‘a’ of this thesis.

⁹⁶ Maduro, Miguel P., *Legal Travels and the Risk of Legal Jet-Lag: The Judicial and Constitutional Challenges of Legal Globalisation*, In: Monti, Mario et. al. (Eds.), *Economic Law and Justice in Times of Globalisation: Festschrift for Carl Baudenbacher*, Baden-Baden, 2007, p. 180.

If national organs – especially the legislative power – do not make international law effective in domestic legal orders, consistent interpretation should come into play. Consistent interpretation means the interpretation of national law in conformity with international obligations, and it is expected to be performed by national judges as well as administrative bodies, as they are able to connect the international to the national legal order and, as a result, really provide rule of law. A decision to be regarded as an example of consistent interpretation requires that the court “considers a rule of international law in the interpretation or application of national law, and the outcome is consistent with both national and international law”.⁹⁷ So, although consistent interpretation and direct effect are different, one may consider the former as a means to gain results that are similar to those of direct effect of international law.⁹⁸ Concerning the scope of consistent interpretation, *Nollkaemper* argues that:

“where an international obligation that comprises a minimum standard, and a domestic standard provides for greater protection than international law, the principle of consistent interpretation does not require that the national standards are interpreted in conformity with the lower international standard.”⁹⁹

So, following *Nollkaemper*’s standpoint, I believe that the principle of consistent interpretation may also be compared to the EU *Solange* principle with regard to the larger protection of human rights recognised and protected by national constitutions. But, because access to justice is a right, the parties with a conflict of interests are not obliged by either domestic constitutional law or by international law to call upon courts to settle the issue. On the other hand, parties are also forbidden to take justice into their own hands. Thus, the right of access to justice also depends on the will of persons.

National and international courts as well as quasi-judicial and non-judicial mechanisms of national institutions and international organisations must also be

⁹⁷ Nollkaemper, p. 140.

⁹⁸ This summarises what *André Nollkaemper* believes with regard to the relation between the principle of consistent interpretation and the direct effect of international law (*National Courts and the International Rule of Law*, p. 141).

⁹⁹ Nollkaemper, p. 139.

independent and accountable. In Brazil, there is, besides the judiciary and administrative review, also arbitration¹⁰⁰ and other means of solving legal conflicts.¹⁰¹

3. Access to Justice as a Constitutional Right

This section is intended to complement the previous one with the concept of access to justice as a constitutional right. According to *Canotilho*,¹⁰² constitutional rights are legal rights that were positivated in a constitutional order. Although the right of access to justice is a natural and inalienable right of the human being, it has been ‘positivated’ in national constitutions. *Canotilho*¹⁰³ argues that, without this constitutional positivism, human rights are nothing more than hopes, aspirations, thoughts, impulses, or sometimes even mere political rhetoric. In Brazil, the right of access to justice has the status of a fundamental right and is foreseen in Art. 5, XXXV of the Federal Constitution as follows:

Art. 5. All persons are equal before the law, without any distinction whatsoever, Brazilians and foreigners residing in the country being ensured of inviolability of the right to life, to liberty, to equality, to security and to property, on the following terms:

(...)

XXXV - the law shall not exclude any injury or threat to a right from the consideration of the Judicial Power;¹⁰⁴

Therefore, access to justice has a character of positive law and a status of fundamental right in the Brazilian Constitution. According to *Dürig*, fundamental rights constitute

¹⁰⁰ Arbitration is governed by a law that allows the parties to elect it through a statement of understanding, which involves deciding on the arbitrator who will be expected to find the solution that best meets the interests involved.

¹⁰¹ For details, see the section of this thesis named ‘Alternative Dispute Settlement Procedures (Non-State-Owned)’.

¹⁰² Canotilho, José J. G., *Direito Constitucional e Teoria da Constituição*, 7th ed., Coimbra, 2003, p. 377 quoted in Paroski, p. 138, footnote 1.

¹⁰³ Canotilho, 2003, p. 377, quoted in Paroski, p. 139, continuation of his footnote 1.

¹⁰⁴ Art. 5º Todos são iguais perante a lei, sem distinção de qualquer natureza, garantindo-se aos brasileiros e aos estrangeiros residentes no País a inviolabilidade do direito à vida, à liberdade, à igualdade, à segurança e à propriedade, nos termos seguintes:

(...)

XXXV - a lei não excluirá da apreciação do Poder Judiciário lesão ou ameaça a direito;

a system of values and guarantees of human beings in relation to the State.¹⁰⁵ This, as a consequence, ensures to citizens their right to file actions. For *Weiler*, access to justice in its basic manifestation is “concerned with the essential constitutional requirements in civil (and criminal) procedure to ensure a process which corresponds to societal notions of justice”.¹⁰⁶

Concerning the difference between human rights and fundamental rights, it is worth mentioning *Canotilho* once again. For him, the terms human rights and fundamental rights can be distinguished according to their origins and meanings as follows: human rights are valid to all peoples and in all times; fundamental rights are those human rights that are legally and institutionally guaranteed but subject to space and time limitations.¹⁰⁷ *Sarlet* provides another definition: the term ‘fundamental rights’ applies to those of human rights that have been recognised and positivated in the positive constitutional law sphere (of a State, according to the author), whereas the expression ‘human rights’ would maintain a relationship with documents of international law that recognise the human being as such, regardless of his connection with a certain constitutional order, and, therefore, rights to be considered universally valid to all peoples and all times, having thus an unmistakably international character.¹⁰⁸ I agree with *Sarlet*, but with a caveat: the expression ‘fundamental rights’ applies not only to the constitutional law of a country, but also to a constitutional law with supranational character such as EU constitutional law.

In the structure created by fundamental rights, access to justice is a fundamental constitutional premise that validates the hierarchical infra-constitutional chain of legal rules to be applied by courts. According to the Kelsenian understanding of the separation of justice and law, access to justice seeks the application of constitutional positive law. This constitutional law, however, is not always the most appropriate, but is rather the one that has been legitimated to regulate conflicts taken to national courts.¹⁰⁹

¹⁰⁵ Dürig, Günter, *Einführung zum Grundgesetz*, 33rd ed., München, 1996, p.10, quoted in Hess, Heliana M.C., *Acesso à justiça por reformas judiciais*, Campinas, 2004, p. 16.

¹⁰⁶ Weiler, 1982, p. 500.

¹⁰⁷ Canotilho, José J. G., *Direito Constitucional e Teoria da Constituição*, 3rd ed., Coimbra, 1998, p. 259.

¹⁰⁸ Sarlet, Ingo W., *A eficácia dos direitos fundamentais*, 6th ed., Porto Alegre, 2006, p. 35 f.

¹⁰⁹ Hess, p. 13.

Hess¹¹⁰ explains the course of judicial protection in Brazil: conflict of interests, lawsuit, competent court, formality of the procedure, evidences, trial, review through the appropriate kind of appeal, execution of the judgement and, finally, the consent of the State and, therefore, access to justice. In practice, however, the winning party of a lawsuit will not always be the party that deserves to win and, as a consequence, judicial protection does not enable access to justice. This is because the litigant with more resources almost always uses the services of the most competent law firms. Winning a case depends, in other words, largely on who has access to the best attorneys and uses the best procedural strategy.

In several countries, the State has the monopoly to ‘declare the law’.¹¹¹ It does so through its judiciary. This stresses, as a consequence, that the State is also responsible for the implementation of effective means to resolve conflicts of interest. This should be constitutionally guaranteed in order to perform the maintenance of peace, which can be accomplished when legal disputes are solved in accordance with principles of reasonableness and rule of law.

The right of access to justice has been inserted in both national constitutions and ‘international constitutions’. For Silva,¹¹² in contrast to Sarlet, there are ‘international constitutions’. Silva defines ‘international constitutions’ as the treaties, conventions, and international covenants that express the concept of human dignity and access to the judiciary. For those who defend an international constitutionalism through which human rights must be at the forefront, treating international treaties, conventions and agreements as ‘international constitutions’ is likely to bring progress. These international instruments reflect the internationalisation of rights and, when incorporated into the national legal system and receive constitutional status, can be interpreted and applied as national law. So, a question arises, namely: does access to justice as a constitutional right include the right to consistent interpretation? Given that I believe in an international structure that can be constitutionalised without de-constitutionalising national *Magna Cartas*, but rather complementing them – as the

¹¹⁰ Hess, p. 21.

¹¹¹ ‘dizer o Direito’, in Portuguese.

¹¹² Silva, José A. da, *Curso de Direito Constitucional Positivo*, 13rd ed., São Paulo, 1997, p. 176, quoted in Hess, p. 13.

EU experiences proved to be possible, I believe that consistent interpretation is a key factor for respect for human rights, coherence in legal reasoning and judicial harmonisation.

However, as we shall see in the chapter of this thesis that refers to Brazil, only human rights that are foreseen in international instruments receive constitutional status after the Brazilian ratification. All other rights out of international instruments receive infra-constitutional status.

The development of national rule of law is defined by *Jielong* as “a sovereign matter and, as such, in principle, allows no interference from any other country or international organization unless with the consent of the country concerned”.¹¹³ Nevertheless, *Nollkaemper* stresses that national rule of law does not provide an appropriate framework for the control of public power, namely concerning transnational issues like financial stability, environmental protection and the protection of fundamental rights.¹¹⁴ I agree with *Nollkaemper* and would like to complement his list with transnational trade issues. In addition, I follow the UN understanding¹¹⁵ that rule of law must respect human rights. This brings to the fore *Frowein* and his definition of the constitutionalisation of public international law. According to him, the increased focus on the rights of individuals in a structure of international law that is going through transformations and has human rights lawyers at the forefront may be referred to as the ‘constitutionalisation of public international law’.¹¹⁶ As *Cottier* and *Hertig* explain:

“before it was employed by international lawyers, the term ‘constitutionalization’ was introduced in the context of the European Community, describing the “process by which the ECJ [European Court of Justice] transformed treaty into constitution”, mainly by

¹¹³ Jielong, Duan, *Statement on the Rule of Law at the National and International Levels*, In: *Chinese Journal of International Law*, Vol. 6, Nr. 1, 2007, pp. 187-188.

¹¹⁴ Nollkaemper, André, *National Courts and the International Rule of Law*, New York, 2011, p. 2.

¹¹⁵ For details, see UN Security Council, *Report of the Secretary-General on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies* (UN Doc S/2004/616).

¹¹⁶ Frowein, Jochen A., *Konstitutionalisierung des Völkerrechts*, in: Dicke, Klaus/Hummer, Waldemar/Girsberger, Daniel et al, (Ed.), *Public Law and Private International Law in a Globalising International System*, in: *Berichte der Deutschen Gesellschaft für Völkerrecht* 39 (2000), p. 438 et seq., quoted in *Cottier/Hertig*, p. 271.

attributing direct effect and supremacy of Community law and developing a fundamental rights doctrine for the European Union.”¹¹⁷

In the European Union, the Charter of Fundamental Rights of 2000 lists individual rights (e.g., right to life, liberty, property), established principles (e.g., legality, equality, proportionality, legal defence),¹¹⁸ and defines the rights related to the right of access to justice (e.g., right to petition for something, right to an impartial court, right to defence). But, even before the Charter of Fundamental Rights, the European Court of Justice realised the need to expand the concept of access to justice and transformed it into a supranational fundamental right through a modification of models of legal hermeneutics.¹¹⁹ Hess¹²⁰ explains that a supranational fundamental right is nationally guaranteed by the State through its national Constitution and also supranationally guaranteed by alternative means of dispute settlement, which include tribunals and institutions beyond the borders of the State.

Some also consider access to justice as the most basic fundamental right,¹²¹ because it is precisely through its exercise that other fundamental rights might be ensured and recovered if violated, particularly in a society in which the legal system does not guarantee the preservation or restoration of rights.¹²² I, however, disagree. This is because I believe that, in order for the right of access to justice to exist, and for a person be able to really enjoy it, other rights must previously exist, like the recognition of a person as a person before the law, liberty, dignity and non-discrimination of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.¹²³ The lack of any of these rights represents a barrier for a person to exercise his right of access to justice.

¹¹⁷ Cottier/Hertig, p. 271 f. The expression “process by which the ECJ [European Court of Justice] transformed treaty into constitution” is used in Snyder, Francis, *General Course on Constitutional Law of the European Union*, in: Academy of European Law (Ed.), *Collected Courses of the Academy of European Law*, Vol. VI, Nr. 1 (1995), p. 56.

¹¹⁸ Proportionality manifests itself when it is necessary to give priority to a specific principle or law to the detriment of other principles or laws.

¹¹⁹ Hess, p. 22.

¹²⁰ Hess, p. 23.

¹²¹ E.g., Mauro Cappelletti in Cappelletti, Mauro/Garth, Bryant, *Acesso à Justiça* (translated by Northfleet, Ellen G.), Porto Alegre, Sergio Antonio Fabris Editor, 2002, p. 11 f.

¹²² Paroski, Mauro Vasni, *Direitos Fundamentais e Acesso à Justiça na Constituição*, São Paulo, 2008, p. 138

¹²³ These rights are foreseen in Articles 6, 1 and 2 of the Universal Declaration of Human Rights.

Therefore, I agree with the reasoning of *Canotilho*¹²⁴ and other authors who consider access to justice as a framing principle of fundamental rights, i.e. in order to make them effective. The right to life and all the remaining rights in a State and outside of it cannot be protected without the guarantee of access to justice. Furthermore, studies relating to the nature of human beings have proven that the more freedom people have, the greater are the violations of third parties' rights and obligations.

4. Constitutionalism

In the early stages of constitutionalism, the State was the only creator of legal rules. This understanding follows the so-called 'legalistic positivism'.¹²⁵ For some authors, this is a weak kind of constitutionalism that has been based on the eighteenth-century conception of positivism, which creates the 'rules of the game', limits that cannot be crossed, rights that cannot be violated and becomes, as a consequence, a minimalistic constitutionalism.¹²⁶ Today, a national constitution continues to be a creation of the government of a Nation State rather than a creation of its people¹²⁷ and is a framework of reference whose continuity and eventual alterations remain subject to the discretion of the legislative power. I agree with *Bachof* that numerous formal

¹²⁴ Canotilho, José J. G., *Direito Constitucional e Teoria da Constituição*, 7th ed., Coimbra, 2003, p. 433 and 492 quoted in Paroski, p. 140.

¹²⁵ Legalistic positivism proposes the interpretation of legal rules in accordance with the historical intentions of the legislator. For more details, see Hespanha, António Manuel, *Cultura jurídica europeia: síntese de um milénio*, Lisbon, 2003, pp. 280-284. The term (originally in German) was first used by Savigny in 1814. For details, see Savigny, Friedrich Carl von, *Vom Beruf unserer Zeit für Gesetzgebung und Rechtswissenschaft*, Hildesheim, 1967 (a reprint of the first edition published in 1814).

¹²⁶ Julios-Campuzano, p. 16.

¹²⁷ Yes, a 'creation of the government' on behalf of its people or as a representative of its people. The text of the preamble of the Brazilian Constitution illustrates this well:

Nós, representantes do povo brasileiro, reunidos em Assembléia Nacional Constituinte para instituir um Estado Democrático, destinado a assegurar o exercício dos direitos sociais e individuais, a liberdade, a segurança, o bem-estar, o desenvolvimento, a igualdade e a justiça como valores supremos de uma sociedade fraterna, pluralista e sem preconceitos, fundada na harmonia social e comprometida, na ordem interna e internacional, com a solução pacífica das controvérsias, promulgamos, sob a proteção de Deus, a seguinte CONSTITUIÇÃO DA REPÚBLICA FEDERATIVA DO BRASIL.

In English:

We, the representatives of the Brazilian People, convened in the National Constituent Assembly to institute a Democratic State, for the purpose of ensuring the exercise of social and individual rights, liberty, security, well-being, development, equality and justice as supreme values of a fraternal, pluralist and unprejudiced society, founded on social harmony and committed, in the internal and international orders, to the peaceful settlement of disputes, promulgate, under the protection of God, this CONSTITUTION OF THE FEDERATIVE REPUBLIC OF BRAZIL.

constitutional rules are in a constitution because of the interests of the political groups that were determinant in the making of the constitutional text.¹²⁸

Constitutions are the ultimate expression of an entire political system, and they define the polity because they establish the guiding principles that the political system will express and enforce, and, as a result, produce limits and constraints upon the political system. The national constitutional setting is, therefore, crucial for all sorts of external policies.

According to *Ferrajoli*,¹²⁹ the creation of laws in accordance with the formal criteria that are established by a constitution guarantees the validity of those laws. A constitution contains, therefore, the essential elements of a national legal system and has the status of the '*Grundgesetz*' ('basic law', in English) of a country. The constitution-making power, however, should not be hedged by a sort of 'supreme law' that harms the effectiveness of democratic principles, as laws cannot be created without taking historical events into due consideration.¹³⁰

The 20th century had several catastrophes and huge wars that changed the moral foundations of civilisation. In Europe, especially after the end of World War II, legal thought and legal culture underwent great changes, as European countries realised the weaknesses that national legal formalisms and national rule of law may represent for a peaceful international coexistence of nations. The creation of the European Communities, the European Union and their various institutions show that Member States have understood that national existing law does not always presuppose legitimate law. By the same token, *Pérez Luño*¹³¹ argues that the list of fundamental rights cannot be considered a finished and closed catalogue, as the mutual interests of peoples and the globalisation phenomenon are creating new legal actors at global level. There is an interdependence between countries and, as a result, national constitutions cannot remain separate and silent about the transformations that the world is experiencing. In the words of *Stoll*, constitutionalism "is a broad term, which

¹²⁸ Bachof, Otto, *Normas Constitucionais Inconstitucionais?* (translated by José Manuel M. Cardoso da Costa), Coimbra, Atlântida Editora, 1977, p. 40.

¹²⁹ Ferrajoli, Luigi, *Epistemología Jurídica y Garantismo*, Mexico City, 2006, p. 260.

¹³⁰ Julios-Campuzano, p. 16.

¹³¹ Pérez Luño, Antonio E. (Ed.), *Derechos Humanos y Constitucionalismo Ante el Tercer Milenio*, Madrid, 1996, p. 15.

importantly relates to the political and legal systems and implies a more general view”.¹³² He argues that different aspects come into play, like governance, participation, legitimacy and democracy, for example.¹³³ In the view of *Petersmann*, constitutionalism is the basic idea of limited government under the rule of law.¹³⁴ Similarly, *Canotilho* considers constitutionalism as a theory or even an ideology that raises the principle of a limited government that is indispensable for guaranteeing rights and obligations in the structural dimension of the political and social organisation of a community. For him, the constitutional movement that created the modern sense of constitution has roots in several periods of history and in different cultural and geographical spaces.¹³⁵

One can argue, therefore, that the State link of the legalistic positivism concept of constitutionalism is no longer sufficient and has failures that require a post-national constitutionalism which is not totally tied to State organs and national jurisdictions.¹³⁶ In fact, the concept of State in international law is different from the concept of State in national constitutional law.¹³⁷ I defend the concept of State in international law, as this concept recognises a post-national constitutionalism that allows quicker adaption to different legal, political, social and environmental circumstances not only at national but also at international level. States have to follow the dynamics of the globalised and interdependent world we live in and, at the same time, maintain a causal connection with the origins of constitutionalism. *Cottier* and *Hertig* recall that the Western Nation State was and still is “the central concept of classical international law of coexistence, as it emerged in the aftermath of the Peace of Westphalia”.¹³⁸ According to the same authors, who also quote *Salcedo* and *Hobe*, international law “was conceived as a little institutionalized, ‘decentralized system’, the sovereign

¹³² Stoll, Peter-Tobias, *Constitutional Perspectives on International Economic Law*, in: Cremona, Marise/Hilpold, Peter/Lavranos, Nikos/Staiger Schneider, Stefan/Ziegler, Andreas R. (Eds.), *Reflections on the Constitutionalisation of International Economic Law: Liber Amicorum for Ernst-Ulrich Petersmann*, Leiden/Boston, Brill, 2014, p. 204.

¹³³ *Ibid.*

¹³⁴ Petersmann, Ernst-Ulrich, *Constitutionalism, Constitutional Law and European Integration*, in: *Aussenwirtschaft*, Vol. 46 (1991), St. Gallen, p. 252 f.

¹³⁵ Canotilho, José J. G., *Direito Constitucional e Teoria da Constituição*, 2nd ed., Coimbra, 1998, p. 45.

¹³⁶ Julios-Campuzano, p. 55.

¹³⁷ For details, see Doebling, Karl, *Allgemeine Staatslehre*, Heidelberg, 1991, p. 18 ff.

¹³⁸ Cottier, Thomas/Hertig, Maya, *The Prospects of 21st Century Constitutionalism*, In: Bogdandy, Armin v./Wolfum, Rüdiger, *Max Planck Yearbook of United Nations Law*, Vol. 7 (2003), Leiden/Boston, Brill, 2004, p. 265.

states being both ‘the creators and the subjects of its norms’, the individuals its objects.”¹³⁹ They also emphasise that:

“[t]he rule of law, and the principle of separation of powers, both core precepts of liberal constitutionalism, thus only applied within the Nation State, whereas international law remained a “constitution-free” and “morality-free zone”, dominated by utter *Realpolitik* and the barrel of the gun.”¹⁴⁰

Thus, rules must have what *Hart* calls ‘open texture’. *Hart*’s ‘open texture’ concept means that judges have to use their discretion in cases in which it is not clear which rules to apply or are not governed by any rule. According to *Hart*, these situations may be classified in three groups:¹⁴¹ (1) imprecise legal rules, (2) rules that have very general standards in their texts (e.g., ‘justice’, ‘fairness’ and ‘reasonableness’), and (3) the unclear criteria for choosing precedents and extracting holdings in the common law system and, therefore, the ability of judges for widening or narrowing rules taken from precedents.

With respect to the State link in Brazil, it is worth emphasising that the current federal constitution characterises the country as an ‘*Estado Democrático de Direito*’.¹⁴² The expression may be defined in English as a ‘democratic State based on the rule of law’ and is supposed to mean, as a consequence, more than a *Rechtsstaat*. According to *Canotilho*,¹⁴³ while an *Estado de Direito*¹⁴⁴ means a State without any confusion of powers, an *Estado Democrático de Direito* implies a democratic State without any

¹³⁹ Cottier, Thomas/Hertig, Maya, p. 265. For details on ‘decentralised system’, they referred in a footnote to Salcedo, Juan A. C., *Reflections on the Existence of a Hierarchy of Norms in International Law*, in: *European Journal of International Law*, Vol. 8 (1997), Nr. 4, p. 583 *et. seq.*. And for details on ‘the creators and the subjects of its norms’, the authors wrote a footnote that refers to Salcedo, Juan A. C., p. 583; Hobe, Stephan, *The Era of Globalisation as a Challenge to International Law*, in: *Duquesne Law Review*, Vol. 40, 2001-2002, p. 657.

¹⁴⁰ Cottier/Hertig, p. 266.

¹⁴¹ For details, see Bix, Brian, H. L. A. *Hart and the “Open Texture” of Language*, in: *Law and Philosophy*, Vol. 10, Nr. 1 (February, 1991), pp. 51-72, available at <http://www.jstor.org/stable/pdfplus/3504835.pdf?acceptTC=true>. Date of access: 10th October 2012.

¹⁴² Art. 1. *A República Federativa do Brasil, formada pela união indissolúvel dos Estados e Municípios e do Distrito Federal, constitui-se em Estado Democrático de Direito e tem como fundamentos:*

(...)

¹⁴³ *Canotilho*, 1998, p. 87.

¹⁴⁴ ‘*Estado de Direito*’ is ‘*Rechtsstaat*’ literally translated to Portuguese.

confusion of powers (i.e., a democratic *Rechtsstaat*)¹⁴⁵ which generates an ‘*Estado constitucional democrático de direito*’ (i.e., a ‘democratic constitutional *Rechtsstaat*’ or rather a ‘democratic constitutional State based on the rule of law’), that is to say an ‘*ordem de domínio*’ (a ‘domain order’) that has been legitimised by the people, and a political power that must derive from the power of citizens.¹⁴⁶

For Häberle, the contemporary State must be a ‘cooperative constitutional State’.¹⁴⁷ As such, it must have a ‘constitutional openness’ to international law and result from cooperation among peoples.¹⁴⁸ According to Cottier and Hertig, public international law is evolving “from a law of coexistence to a law of cooperation, increasingly addressing domestic matters, and, partially, to a regional or even global law of integration”.¹⁴⁹ This ‘global law of integration’ can be described as legal standards that are uniform or approximated to domestic legal standards, but are in international treaties, especially those that concern economic regulation.¹⁵⁰

Häberle stresses that cooperation will become part of the identity of the ‘*Verfassungsstaat*’ (i.e., ‘constitutional State’) and, in the interest of constitutional transparency, should be documented in the State’s legal texts, especially in the constitutional ones. The same German author recognises, however, that a comparison among constitutional States shows that they currently continue to be quite diverse with regard to the cooperative aspect.¹⁵¹ In Häberle’s words, a ‘cooperative constitutional State’ is:

“the State that finds its identity also in international law, in the intertwining of international and supranational relations, in the

¹⁴⁵ For more details on the difference, see Habermas, Jürgen, *Faktizität und Geltung: Beiträge zur Diskurstheorie des Rechts und des demokratischen Rechtsstaats*, Frankfurt am Main, 1992, p. 166 ff.

¹⁴⁶ For details on the power of the citizens, see Böckenförde, Ernst-Wolfgang, *Demokratie als Verfassungsprinzip*, in: Isensee, Joseph/Kirchhof, Paul (Eds.), *Handbuch des Staatsrechts*, Vol. 1, 1987, p. 887 ff., quoted in Canotilho, 1998, p. 92.

¹⁴⁷ Häberle, Peter, *Estado constitucional cooperativo* (translated by Marco Augusto Maliska and Elises Antoniuk), Rio de Janeiro, 2007, p. 1 f., quoted in Figueiredo, p. 90.

¹⁴⁸ Figueiredo, p. 90.

¹⁴⁹ Cottier, Thomas/Hertig, Maya, p. 267. The authors also quote Wolfgang Friedmann (*The Changing Structure of International Law*, Stevens & Sons, London, 1964, pp. 60-68) for the term law of cooperation and Stephan Hobe (*The Era of Globalisation as a Challenge to International Law*, in: *Duquesne Law Review*, Vol. 40, 2001-2002, p. 663) for global law.

¹⁵⁰ Cottier, Thomas/Hertig, Maya, p. 267.

¹⁵¹ Häberle, 2007, p. 3 f., quoted in Figueiredo, p. 90.

perception of international cooperation and international responsibility as well as in the field of solidarity. The State corresponds thereby to the international need for peace policies.”¹⁵²

While *Ferrajoli*¹⁵³ argues that a new constitutionalism also has the potential of avoiding that the diverse national jurisdictions of our globalised world cause a regression to the legal pluralism of pre-modern law, *Julios-Campuzano*¹⁵⁴ believes that national constitutions must be based on interdependence rather than on the autarchy of the legal system. So, one may conclude from both interpretations that Nation States’ legal systems do not need to be replaced, but require effective mechanisms of both interdependence and interpenetration, given that it is the State rather than constitutionalism that is in crisis. And this crisis reveals the insufficiencies of the Nation States with respect to globalisation.

For *Canotilho*, the purposes of States can and should be the construction of ‘*Estados de direito democráticos, sociais e ambientais*’ (i.e., democratic, social and environmental States based on the rule of law) at the domestic level, and open, internationally friendly and cooperative States in external relations.¹⁵⁵ In another book, the same author defines that ‘international openness’ is the affirmation of international law as the laws of countries themselves (i.e., national law) and is the recognition of certain international law principles and rules as ‘measures of justice’ that are binding on domestic law.¹⁵⁶ This ‘international openness’ would be based on intrinsically just principles like the principles of national independence, respect for human rights and the rights of peoples, equality among States, the peaceful settlement of international disputes, non-interference in the internal affairs of other States and cooperation with all peoples for the emancipation and progress of humanity.¹⁵⁷ *Canotilho* also defends international relations regulated by principles of law and

¹⁵² “É o Estado que justamente encontra a sua identidade também no direito internacional, no entrelaçamento das relações internacionais e supranacionais, na percepção da cooperação e responsabilidade internacional, assim como no campo da solidariedade. Ele corresponde, com isso, à necessidade internacional de políticas de paz” (Häberle, 2007, p. 4).

¹⁵³ For details, see Ferrajoli, Luigi, *Pasado y Futuro del Estado de Derecho*, In: Carbonell, Miguel (Ed.), *Neoconstitucionalismo(s)*, Madrid, 2005, p. 20 f.

¹⁵⁴ Julios-Campuzano, p. 65.

¹⁵⁵ Canotilho, 1998, p. 1217.

¹⁵⁶ Canotilho, José J. G., *Direito Constitucional*, 4th ed., Coimbra, 2001, p. 363.

¹⁵⁷ *Ibid.*

justice in order to convert international law into a truly imperative order, which, as a result, supports international relations through the progressive elevation of human rights – especially in the areas in which they do not yet integrate *jus cogens*¹⁵⁸ – to a legal standard of conduct in domestic and foreign policies.¹⁵⁹

Furthermore, while *McHugh* argues that the growing interdependence and interaction of the world community increased the importance of constitutionalism,¹⁶⁰ if one takes EU law into consideration, one may easily realise that constitutionalism can also change simple treaties into lasting institutions and can delegate sovereign authority rather than displace it. *Cottier* and *Hertig* describe this process of regionalisation and globalisation as legal and *de facto* denationalisation.¹⁶¹

What becomes evident, therefore, is the importance of constitutionalism in protecting fundamental rights and human rights, including the right of access to justice, both nationally and internationally. As I have mentioned in the preceding section of this chapter, the increased focus on the rights of individuals in a structure of international law that is undergoing transformations and has human rights lawyers at the forefront may be referred to as the ‘constitutionalisation of public international law’.¹⁶² Judicial review is also definitely a necessity of constitutionalism.¹⁶³ Outside EU law,

¹⁵⁸ Vienna Convention on the Law of Treaties of 1969, Art. 53 – *Treaties conflicting with a peremptory norm of general international law (“jus cogens”)*: A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

Vienna Convention on the Law of Treaties of 1969, Art. 64 – *Emergence of a new peremptory norm of general international law (“jus cogens”)*. If a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates.

¹⁵⁹ Canotilho, 1998, p. 1218.

¹⁶⁰ McHugh, James T., *Comparative Constitutional Traditions*, in: Schultz, David A. (Ed.), *Teaching Texts in Law and Politics*, Vol. 27, New York, 2002, p. 216.

¹⁶¹ For details, see Tietje, Christian, *Global Governance and Inter-Agency Co-operation in International Economic Law*, in: *JWT* 36 (2002), p. 501 et seq.; Thürer, Daniel, *Die Bundesverfassung von 1848: Kristallisationspunkt einer Staatsidee*, in: *Zeitschrift für Schweizerisches Recht* 117 (1998), p. 163 et seq.; Delbrück, Jost, *Globalization of Law, Politics, and Markets – Implications for Domestic Law – A European Perspective*, in: *Ind. J. Global Legal Stud.*, 1 (1993), p. 10 et seq.; all quoted in Cottier/Hertig, p. 268.

¹⁶² Frowein, Jochen A., *Konstitutionalisierung des Völkerrechts*, in: Dicke, Klaus/ Hummer, Waldemar/ Girsberger, Daniel et al, (Ed.), *Public Law and Private International Law in a Globalising International System*, in: *Berichten der Deutschen Gesellschaft für Völkerrecht* 39 (2000), p. 438 et seq., quoted in Cottier/Hertig, p. 271.

¹⁶³ For this, see Witte, Bruno de, *The Protection of Linguistic Diversity through Fundamental Rights* (Ph.D. thesis, Law Department of the European University Institute), Florence, 1985, p. 109.

‘constitutionalisation’ is, however, less developed and more unsettled in public international law.¹⁶⁴ Cottier and Hertig explain that constitutionalisation outside EU law:

“stands both for an analytical tool to describe the structural changes of the international legal system and for a strategy as to how to further enhance the efficiency, coherency and legitimacy of international law by applying constitutional law theories to the international system as a whole or to international organizations.”¹⁶⁵

There are currently different expressions used by different scholars with regard to a constitutionalisation of public international law and a theory of international constitutional law. Some examples are ‘emerging global constitution’,¹⁶⁶ ‘constitution for mankind’,¹⁶⁷ ‘universal constitution of public international law’,¹⁶⁸ ‘constitution of the international community’,¹⁶⁹ and ‘international economical constitution’.¹⁷⁰ Cottier and Hertig,¹⁷¹ nevertheless, point out that legal scholars were divided in two groups concerning this ‘constitutionalisation of public international law’ and the extensive use of the term ‘constitution’. These groups were named, following Biaggini, the ‘statist’ and the ‘internationalist’ school.¹⁷² While according to the statist line of thought a constitution is inherently linked to a State, the internationalist school

¹⁶⁴ Cottier/Hertig, p. 272.

¹⁶⁵ *Ibid.*

¹⁶⁶ Müller, Jörg P., *Wandel des Souveränitätsbegriffs im Lichte der Grundrechte – dargestellt am Beispiel von Einwirkungen des internationalen Menschenrechtsschutzes auf die schweizerische Rechtsordnung*, in: Rhinow, René/Ehrenzeller, Bernhard (Ed.), *Fragen des internationalen und nationalen Menschenrechtsschutzes*, Zeitschrift für Schweizerisches Recht 116 (1997), p. 63, quoted in Cottier/Hertig, p. 277 (translated by the authors).

¹⁶⁷ Tomuschat, Christian, *International Law as the Constitution of Mankind*, in: United Nations (Ed.), *International Law on the Eve of the Twenty-First Century. Views from the International Law Commission*, 1997, p. 37 et seq., quoted in Cottier/Hertig, p. 277.

¹⁶⁸ Müller, Jörg P., p. 62, quoted in Cottier/Hertig, p. 277 (translated by the authors).

¹⁶⁹ Fassbender, Bardo, *The United Nations Charter As Constitution of the International Community*, in: *Colum. J. Transnational L.* 36 (1998), p. 529 et seq.; Dupuy, Pierre-Marie, *The Constitutional Dimension of the Charter of the United Nations Revisited*, in: *Max Planck Yearbook of United Nations Law*, Vol. 1 (1997), p. 1 et seq., all quoted in Cottier/Hertig, p. 277.

¹⁷⁰ Langer, Stefan, *Grundlagen einer internationalen Wirtschaftsverfassung: Strukturprinzipien, Typik und Perspektiven anhand von Europäischer Union und Welthandelsorganisation*, 1995, p. 17 et seq.; Oppermann, Thomas, *Die Europäische Gemeinschaft und Union und die Welthandelsorganisation (WTO)*, *RIW*, Vol. 41 (1995), p. 920 et seq., all quoted in Cottier/Hertig, p. 277 (translated by the authors).

¹⁷¹ Cottier/Hertig, p. 278.

¹⁷² Biaggini, Giovanni, *Die Idee der Verfassung – Neuausrichtung im Zeitalter der Globalisierung?*, in: *Zeitschrift für Schweizerisches Recht*, Vol. 119 (2000), p. 455, quoted in Cottier/Hertig, p. 278 (translated by the authors).

considers that the concept of ‘constitution’ should be decoupled from States.¹⁷³ Internationalist scholars defend that the ‘constitution’ has considerably evolved over time and a State-link is no longer necessary.¹⁷⁴ Yet, the statist school argues that such a historical argument “is not relevant as it fails to distinguish between a descriptive and a normative concept of ‘constitution’”.¹⁷⁵ This brings *Fossum*¹⁷⁶ to the fore, as he defends that the terms ‘constitution’ and ‘constitution-making’ must be reconceptualised. I agree with him, and I also agree with *Cottier* and *Hertig* that “the state centred concept of constitutionalism may have been appropriate, if at all, in the state-centred, dualistic Westphalian system”.¹⁷⁷ As I will explain in the chapter about Brazil, the Brazilian Federal Constitution follows the dualist theory for the incorporation of international norms into the national legal system. Furthermore, I also mention in the chapter on the MERCOSUR that, while Brazil and Uruguay are dualist, Paraguay and Argentina are monist, and, compared to the former two countries, in both Paraguay and Argentina the process of implementation of treaties is quicker and more efficient. In other words, one may conclude that Paraguay and Argentina are ‘friendlier’ towards international law and more pro-MERCOSUR. The same applies in some degree to Venezuela, the last country to join the MERCOSUR. As will be explained in more detail in the section ‘Legal Sources of the MERCOSUR’ of Chapter IV, Venezuela is both monist and dualist, as it follows a mixed theory in the relationship between international and national law in that in some circumstances monist, while in others it is dualist.¹⁷⁸

¹⁷³ Biaggini, p. 455, quoted in Cottier/Hertig, p. 278 (translated by the authors).

¹⁷⁴ Krajewski, Markus, *Verfassungsperspektiven und Legitimation des Rechts der Welthandelsorganisation (WTO)*, 2001, p. 123; Dorau, Christoph/Jacobi, Philipp, *The Debate over a ‘European Constitution’: Is it Solely a German Concern*, in: *European Public Law* 6 (2000), p. 417 et seq., all quoted in Cottier/Hertig, p. 278.

¹⁷⁵ Cottier/Hertig, p. 278. The authors quote Grimm, Dieter, *Does Europe Need a Constitution?*, *ELJ* 1 (1995), p. 284 et seq.

¹⁷⁶ For details, see Fossum, John Erik, *The Transformation of the Nation-state: Why Compare the EU and Canada?*, in: *Francisco Lucas Pires Working Papers Series on European Constitutionalism*, Working Paper Nr. 1, 2003.

¹⁷⁷ Cottier/Hertig, p. 297.

¹⁷⁸ Although Venezuela is monist with regard to some matters and dualist with regard to others, its Constitution explicitly favors a supranational legal order.

“Artículo 153. La República promoverá y favorecerá la integración latinoamericana y caribeña, en aras de avanzar hacia la creación de una comunidad de naciones, defendiendo los intereses económicos, sociales, culturales, políticos y ambientales de la región. La República podrá suscribir tratados internacionales que conjuguen y coordinen esfuerzos para promover el desarrollo común de nuestras naciones, y que garanticen el bienestar de los pueblos y la seguridad colectiva de sus habitantes. Para estos fines, la República podrá atribuir a organizaciones supranacionales, mediante tratados, el ejercicio de las competencias necesarias para llevar a cabo estos procesos de integración. Dentro de las políticas de integración y unión con Latinoamérica y el Caribe, la República

Cottier and Hertig offer a proposal on how constitutionalism in the 21st century should be:

“constitutionalism of the 21st century needs to break “the statist frame” and to escape ‘all or nothing’ propositions. Such a process is not a vain intellectual exercise, but in our view a necessary step to secure the values of constitutionalism in an era of globalization and interdependence: in the same way as the constitutionalism of the 18th, 19th and 20th centuries provided a response to the growing power of the Nation State, it needs to discipline the power of the emerging non-state polities by law, if it is to respond adequately to the increasing ‘denationalization’ of legal and political functions.”¹⁷⁹

Given that the 21st century has just begun, I would go further by proposing a ‘global constitutionalism’ and even, why not, a ‘world constitution’ with supremacy over lower (national) constitutions. These two proposals would represent further steps in the globalisation process – indeed, major ones in legal terms – that depend, in part, on reinterpreting the expression ‘international community’. The goals of the most ambitious national constitutions of the world as well as the Treaty of Lisbon may serve to shape a ‘world constitution’ and promote what the TEU defines as “an international system based on stronger multilateral cooperation and good global governance”.¹⁸⁰ Beyond Europe, it is worth making reference to the Transitional Constitution of the Republic of South Sudan, as it calls for the “promotion of international cooperation, specially within the United Nations family” (...) “for the purposes of consolidating universal peace and security” and “respect for international

privilegiará relaciones con Iberoamérica, procurando sea una política común de toda nuestra América Latina. Las normas que se adopten en el marco de los acuerdos de integración serán consideradas parte integrante del ordenamiento legal vigente y de aplicación directa y preferente a la legislación interna.”

¹⁷⁹ Cottier/Hertig, p. 297 f. For the expression “the statist frame”, the authors quoted Walker, Neil, *The EU and the WTO: Constitutionalism in a New Key*, in: de Búrca, Grainne/Scott, Joanne (Eds.), *The EU and the WTO: Legal and Constitutional Issues*, Oxford (England)/Portland (Oregon), Hart, 2001, p. 39. For “a response to the growing power of the Nation State”, they quoted Castiglione, Dario, *The Political Theory of the Constitution*, in: Bellamy, Richard/Castiglione, Dario (Eds.), *Constitutionalism in Transformation: European and Theoretical Perspectives*, Oxford, Blackwell, 1996, p. 21.

¹⁸⁰ Art. 21 (2)(h) TEU.

law”.¹⁸¹ It is important to bear in mind that there are written and unwritten constitutions, and a ‘world constitution’, as a result, could be unwritten. *Finer*, *Bogdanor* and *Rudden* emphasise that constitutional texts can be “highly incomplete, if not misleading, guides to actual practice”.¹⁸² Furthermore, *Bachof* has already defended the view (at his time) that there may be constitutional law beyond the national constitution.¹⁸³ And, as I have already mentioned in this chapter, there are already written ‘international constitutions’, namely treaties, conventions and international covenants that express the concept of human dignity and access to the judiciary. For those who defend an international constitutionalism, interpreting and treating these documents as ‘international constitutions’ and parts of a ‘world constitution’ can bring progress to peoples.

With specific regard to international economic law, there is currently a dichotomy between domestic and international reviews.¹⁸⁴ *Cottier* and *Hertig* explain that:

“while international judges today in the WTO tend to apply a relatively intrusive standard of review, scrutinizing *de novo* national legislation or administrative action for compliance with WTO law, the review of their colleagues on regional or national levels is characterized by relative restraint, they often limit judicial review to the extent that all decisions not considered capricious and arbitrary will escape judicial protection.”¹⁸⁵

The description of the authors is indeed accurate. Hence, one can define the multilevel situation described above as incoherent, as each of the levels mentioned are treated as independent legal systems.

Petersmann has a series of proposals for the international economic law of the 21st century. Among them, there is a multilevel constitutionalism that:

¹⁸¹ Art. 43 (a) of the Transitional Constitution of the Republic of South Sudan.

¹⁸² *Finer*, Samuel E./*Bogdanor*, Vernon/*Rudden*, Bernard, *Comparing Constitutions*, New York, Oxford University Press, 1995, p. 1.

¹⁸³ *Bachof*, p. 40.

¹⁸⁴ *Cottier/Hertig*, p. 326.

¹⁸⁵ *Ibid.*

“uses constitutional principles, rules and institutions at national and international levels of governance for the collective supply of international public goods, for instance by constituting and limiting international trade organizations with legislative, executive and judicial powers for protecting transnational rule of law among citizens.”¹⁸⁶

The same author also explains that the legitimacy of such a ‘multilevel constitutionalism’ depends on:

“democratic participation of citizens and on parliamentary, administrative, and judicial protection of general citizen interests as defined by human rights and equal constitutional rights.”¹⁸⁷

That is where new challenges arise. The participation of national parliaments and congresses is subject to self-interests of political groups and national sovereignty issues. Hence, the best way around seems to be judicial governance, which has the potential of adapting legal systems to the needs of peoples. This judicial governance and proper interpretation of peoples needs have to be performed at all judicial levels in accordance with human and fundamental rights. A multilevel judicial governance like the one described may create a cooperation among courts, even among those of different legal systems and without any direct hierarchy, and solve the problems linked to the fragmentation of international law without disrespecting each court’s own legitimacy, independence and impartiality to solve disputes. Such multilevel judicial governance is also likely to efficiently enable more consistent interpretations and access to justice.

It can be argued that one of the basic elements of a community of peoples – like the former EC, for instance – is solidarity. At the international level, however, Nation States tend to be both individualistic and voluntaristic as if Nation States, rather than peoples, were the core elements of international law. Thus, solidarity or, at least, some degree of it is prejudiced. This is a question that relates to the interpretation of what

¹⁸⁶ Petersmann, Ernst-Ulrich, *International Economic Law in the 21st Century: Constitutional Pluralism and Multilevel Governance of Interdependent Public Goods* (Oxford and Portland, Oregon, Hart 2012), p. 141.

¹⁸⁷ *Ibid.*

sovereignty is. *Cottier* and *Hertig* argue that the legal system as a whole must protect the rights of the individuals.¹⁸⁸

For *Schmitt*, the classical concept of sovereignty is related to the conquest of land, which generates the initial order of space and subsequently enables all further statutory ordination, thus creating a new *nomos* within the total area conquered and populated.¹⁸⁹ Also according to *Schmitt*, the earth is the *nomos* of the law.¹⁹⁰

The *nomos* is the foundational normative principle that gives meaning and order to a legal and political system. It is based on the *nomos* that each State asserts itself as sovereign in the international community in which it coexists in parity with other States.¹⁹¹ In classical international law, sovereignty belonged initially only to the Nation State, which, with its international sovereignty, does not subordinate itself to any other State or even some sort of ‘super State’ due to their parity status. On the other hand, if one performs a historical analysis, one can realise the numerous transformations through which the concept of sovereignty has already gone through and the several dissolutions that occurred during the development of democratic regimes in Europe and in other parts of the world. The kind of constitutional State that exists in most countries of the world clearly demonstrates the organisation, division and limitation of the sovereignty of the Nation State both internally (i.e., at national level) and externally (i.e., beyond its national borders). Put in other words, law limited and changed the classical concept of sovereignty. What is currently necessary is precisely a re-interpretation of the constitutional State. The Lisbon Treaty proves that an international treaty may obtain the character of a ‘super constitution’ for several countries. Outside the European Union, a first major step could be making international norms domestically implementable and binding from the time in which the State signs a particular international instrument – i.e., without the need for its later ratification. For *Cottier* and *Hertig*, “constellations in which direct effect of international law can be justifiably denied should (...) be rather limited”.¹⁹² It is about different levels of governance working together, with every national constitution

¹⁸⁸ Cottier/Hertig, p. 313.

¹⁸⁹ Schmitt, Carl, *Der Nomos der Erde*, Köln, Greven Verlag, 1950, pp. 17, 19 and 50.

¹⁹⁰ Schmitt, p. 17.

¹⁹¹ Grau, Eros R., *O Direito Posto e o Direito Pressuposto*, 6th ed., São Paulo, Malheiros Editores, 2005, p. 276.

¹⁹² Cottier/Hertig, p. 311.

being a partial constitution¹⁹³ and the idea of sovereignty being “shared between the different levels of governance.”¹⁹⁴

At its different layers, the law should always respect peoples and their human and fundamental rights. And only a ‘global constitutionalism’ seems to be capable of providing the appropriate responses to a ‘world community’, because such a constitutionalism may at a later stage even create a sort of ‘world constitution’ with the necessary coercive power with regard to the respect and the coherent implementation of international law instruments by Nation States in the international legal order and also their respective domestic legal orders. A ‘world constitution’ can also more efficiently protect the principle of the equality of parties before courts, which is one of the core elements of access to justice. I do not mean a general change in the competencies of all courts and that every court (i.e., national, international, supranational, arbitral, etc.) accepts every person (i.e., natural and legal persons of private law and legal persons of public law) as a party, but that the principle of the equality of parties before courts may be effectively respected within each court’s competencies. Furthermore, national constitutions would also need to eliminate inconsistencies that derive from the classical separation of domestic and international law, and adapt to such a ‘world constitution’ so that, for instance, the principle of human dignity, international law and *jus cogens* may be enjoyed by all individuals. *Bachof* stresses with respect to that and concerning access to justice that even a ‘complete’ legal protection cannot save a constitution that fails to accomplish this mission.¹⁹⁵ *Cottier* and *Hertig* recall that “the relationship between international law and domestic law is mainly defined by the national constitution”,¹⁹⁶ however the authors also argue that the constitution “can no longer pretend anymore to provide a comprehensive regulatory framework of the state on its own”.¹⁹⁷ In sum, the globalised world needs ‘*Leistungsstaaten*’ (‘productive States’, ‘performance States’, ‘performing States’ and ‘positive States’ are English translations to be found in the

¹⁹³ *Ibid.*, p. 304.

¹⁹⁴ *Ibid.*

¹⁹⁵ *Bachof*, p. 11.

¹⁹⁶ *Cottier/Hertig*, p. 299

¹⁹⁷ *Ibid.*, p. 303

literature)¹⁹⁸ for their interdependent issues. ‘*Leistungsstaaten*’ are also directly related to the rise of the welfare State.¹⁹⁹

5. Chapter Conclusion

The right of access to justice has a fundamental meaning in legal science. It presents itself as a *lex naturalis* – i.e., inherent to the human being like life, dignity and liberty. As a result, natural law is engaged “to maintain and defend the elementary requirements of human life”²⁰⁰ and is different from the positive law or ‘man-made law’. In Roman law, *lex naturalis* was based on the universal law of morality and on the public obligation rule of living together in society.²⁰¹

With regard to the extent of access to justice in positive national and international laws, it is worth emphasising *Kelsen*, namely, his ‘*grundnorm*’ (i.e., ‘basic norm’) and its assumption to achieve descriptive objective validity.

“With the postulate of a meaningful, that is, non-contradictory order, judicial science oversteps the boundary of pure positivism. ... The basic norm has here been described as the essential presupposition of any positivistic legal cognition. If one wishes to regard it as an element of a natural-law doctrine ... very little objective can be raised; just as little, in fact, as against calling the categories of Kant’s transcendental philosophy metaphysics because they are not data of experience, but conditions of experience. What is involved is simply the minimum,

¹⁹⁸ A definition of ‘*Leistungsstaat*’ in German can be found at the website of the *Bundeszentrale für politische Forschung* and is as follows: *Leistungsstaat* “umschreibt die über rein ordnungspolitische Maßnahmen hinausgehenden auf Vorsorge und Förderung gerichteten staatlichen Leistungen zur Erhöhung der wirtschaftlichen und sozialen Wohlfahrt. Da staatliche Leistungen immer mit Kosten verbunden sind und (durch Steuern etc.) finanziert werden müssen, sind sie immer auch Teil der (Um-)Verteilungspolitik. Zu unterscheiden sind a) staatliche Leistungen und Vorleistungen (z. B. Infrastruktur, Bildung, Anschub von Entwicklungen), b) staatliche Interventionen (direkte/indirekte Subventionierung, finanzielle/rechtliche Förderung, Absicherung von Risiken) und c) Nachsorge (Beseitigung von Schäden, Übernahme von Verlusten).”

The text above can be found at <http://www.bpb.de/wissen/NH31JE>. Date of access: 30th June 2014.

¹⁹⁹ Durham, W. Cole, Foreword: *Comparative Law in the Late Twentieth Century*, in: *Brigham Young University Law Review*, 1987, p. 326.

²⁰⁰ Gilby, Thomas, *Summa Theologiae*, 2nd ed., 1966, 1a2ae.94, quoted in Skubik, Daniel W., *At the Intersection of Legality and Morality: Hartian Law as Natural Law*, New York, 1990, p. 179.

²⁰¹ Hess, p. 5.

there of metaphysics, here of natural law, without which neither a cognition of nature nor of law is possible.’²⁰²

I must, nevertheless, agree with *Roff* that *Kant*’s famous assumption that the Nation State will adequately secure and protect the rights of its people is empirically false.²⁰³ As *Cottier* and *Hertig* have aptly noted, the world has been experiencing a declining regulatory capacity of the Nation State.²⁰⁴

Access to justice was introduced in national constitutions as a fundamental right. At the international level it is present in treaties, conventions, covenants, agreements and declarations. There are, nevertheless, some trade, investment and environmental law instruments which mention neither human rights nor national and international judicial remedies.

The judiciary, as a result, has to interpret the cases that are brought to it so as to reinforce the meaning of access²⁰⁵ to justice,²⁰⁶ which continues to be a vague term for the civil society and even many legal practitioners. This vagueness exists due to the heterogeneity of the world contemporary society – which has pluralistic structures, values and needs – and the different approaches that one may apply in order to define ‘access to justice’. Some of these approaches are (1) the Christian theological, (2) the philosophical, (3) the legal, (4) the sociological and (5) the public management approach. Each one of them has a different definition of what access to justice is. The Christian theological approach defines it with the content of the Bible²⁰⁷ (differently from the Muslim theological approach, for instance, which uses the text of the Quran to define access to justice, as it is regarded by Muslims as the only book protected by

²⁰² Kelsen, Hans, *General Theory of Law and State* (translated by Anders Wedberg), Cambridge, 1945, p. 437, quoted in Skubik, p. 185.

²⁰³ Roff, Heather M., p. 47 ff.

²⁰⁴ Cottier/Hertig, p. 268 f. The authors also make reference to Hobe, Stephan, *The Era of Globalisation as a Challenge to International Law*, in: *Duquesne Law Review*, Vol. 40, 2001-2002, p. 657.

²⁰⁵ ‘Access’ means ‘reach’, ‘entrance’ and ‘passage’.

²⁰⁶ In a few words, ‘justice’ means ‘just’, ‘virtue’, ‘correct’ and ‘equity’.

²⁰⁷ E.g., Petersmann has also already mentioned in one of his works the reference to justice that can be found in the Old Testament. For details, see Petersmann, Ernst-Ulrich, *Administration of Justice in the World Trade Organization: Did the WTO Appellate Body Commit ‘Grave Injustice’?*, in: EUI Working Papers, *Multilevel Judicial Governance Between Global and Regional Economic Integration Systems: Institutional and Substantive Aspects*, Florence, European University Institute, 2009, p. 45.

God from distortion),²⁰⁸ the philosophical approach defines it as an ideal (this ideal, nevertheless, may be different from philosopher to philosopher), the legal one associates access to justice with the philosophical thoughts plus rule of law in all ‘infrastructures’ that administer justice (rule of law, however, depends on legal systems and legal traditions, and is therefore not always just and democratic),²⁰⁹ and the public administrative approach tries to implement one or some of the approaches mentioned above, on a case-by-case basis, through policies that the public administration considers to be suitable for the problems that it has identified and wants to combat concerning access to justice.²¹⁰

Besides the open character of the expression ‘access to justice’, there are also laws with imprecise content. Thus, judges may easily contribute to a better understanding of what access to justice is, namely by developing the law²¹¹ – i.e., by focusing on a constitutional legal methodology of consistently interpreting (consistent interpretation) positive laws, precedents, programmatic norms, soft law rules of international and supranational law (according to the circumstances), of the *lex mercatoria*, of international treaties and conventions, besides those rules that originated in the universal and general principles of law. For *MacCormick*, quoting *Kelsen*, our law, as it develops, becomes “more concretized, more exact, more capable of dealing with more and more fine-grained questions”²¹² as well as “more complex at each level of its development”.²¹³ For me, it is a matter of global constitutionalism, which requires the world to follow the experiences of the European Union, not only regarding trade law but also the protection of different fundamental rights, and to better understand the meaning of rule of law. National judges also play a very important role in this process, as they can compensate for the lack of international

²⁰⁸ For details, see Hussein Sakr, Ahmad, *Understanding the Quran*, Foundation for Islamic Knowledge, Walnut, 2000, p. xii.

²⁰⁹ For details, see Petersmann, Ernst-Ulrich, *Administration of Justice in the World Trade Organization: Did the WTO Appellate Body Commit ‘Grave Injustice’?*, in: EUI Working Papers, *Multilevel Judicial Governance Between Global and Regional Economic Integration Systems: Institutional and Substantive Aspects*, Florence, European University Institute, 2009, p. 53.

²¹⁰ Njupouen, I. Bolivar R., *Access to Justice for the Poort: What Role for Bar Associations? The Case of Cameroon* (master’s thesis of the Master of Science in Governance and Development Management at the School of Public Policy of the University of Birmingham), Birmingham, 2005, pp. 8-15.

²¹¹ According to Lord Reid, developing the law is different from making it in the legislative sense. For details, see Finnis, John, *The Fairy Tale’s Moral*, In: *Law Quarterly Review*, Vol. 115, 1999, pp. 170-173.

²¹² MacCormick, Neil, *Judging Mistakenly*, In: *Rhetoric and the Rule of Law: A Theory of Legal Reasoning*, Oxford and New York, Oxford University Press, 2005, p. 278.

²¹³ *Ibid.*

courts and the frequently complicated access to the existing international courts, mostly open only to States and, in the case of the WTO, to customs territories that have full autonomy to conduct trade policies. So, as *Scelle*²¹⁴ argues, national courts can act as agents of the international legal order and benefit the international rule of law.

I agree with *Jackson* that international law “determines the very foundations of the rule of law that are to apply domestically”.²¹⁵ *Mills* and *Stephens* note, however, that this may create another dilemma, namely that the national judiciary – as a servant of transnational norms – may contradict its role as servant of the domestic rule of law.²¹⁶ For *Petersmann*,

“international trade agreements should also provide for domestic judicial review, for it is the courts which ultimately have to protect the transnational exercise of individual rights by domestic citizens.”²¹⁷

So, it is all about a ‘world under law’.²¹⁸ This expression also becomes linked to what *Altinay*²¹⁹ calls ‘global civics’ – i.e., civic life at world level.

To sum up, the solution, in my view, is to integrate international law to the system of domestic rule of law and the national constitutional system. This can even facilitate the harmonisation of international rules on a global scale. Furthermore, the State can allocate its jurisdiction with other entities that might be at national, supranational and international levels. This allocation allows, among other things, the

²¹⁴ For details, see Cassese, Antonio, *Remarks on Scelle’s Theory of “Role Splitting” (dédoulement fonctionnel) in International Law*, In: *European Journal of International Law*, Vol. 1, Issue 1, 1990.

²¹⁵ Jackson, Vicki, *Constitutional Engagement in a Transnational Era*, Oxford, 2010, p. 260 quoted in Nollkaemper, p. 302.

²¹⁶ Mills, Alex/Stephens, Tim, *Challenging the Role of Judges in Slaughter’s Liberal Theory of International Law*, In: *Leiden Journal of International Law*, Vol. 18, Issue 1, 2005, p. 20.

²¹⁷ Petersmann, Ernst-Ulrich, *National Constitutions and International Economic Law*, In: Hilf, Meinhard/Petersmann, Ernst-Ulrich (Eds.), *National Constitutions and International Economic Law* (Studies in Transnational Economic Law, Vol. 8), Deventer, 1993, p. 52.

²¹⁸ The expression belongs to *André Nollkaemper* and is used on page 9 of his book *National Courts and the International Rule of Law*.

²¹⁹ Altinay, Hakan, *The Case for Global Civics*, In: Brookings Institution, *Global Economy & Development Working Paper* 38, March 2010, to be found at http://www.brookings.edu/~media/Files/rc/papers/2010/03_global_civics_altinay/03_global_civics_altinay.pdf. Date of access: 25th March 2011.

debureaucratisation of the right of access to justice. So, with regard to trade and multilevel trade regulation, the international trading system (including national trading systems) should become rule oriented, i.e. it should really respect the rule of law. National courts should also become conscious of the effects of their decisions at the transnational level, as “any judicial body (national or international) must reason and justify its decisions in the context of the global legal order in which they are impacting”.²²⁰ Consequently, for the purposes of this thesis, access to justice is an essential human right that can be defined as the right of persons to enter courts of law, have their cases heard in balanced proceedings (which guarantee legal defence, adversary systems and lawful judges), and are adjudicated in accordance with substantive standards of fairness and justice.²²¹ According to Cappelletti,²²² “access to justice can be seen as fundamental requisite (...) of a modern and egalitarian legal system that seeks to guarantee rather than only proclaim the rights of all.”²²³ Thus, human rights should always be coherently placed first, as this is what is best for the international community and the nature of our planet. This is intimately linked to rule of law, which, in fewer words than those used by many key authors, can be defined as the method to minimise the danger created by the law itself and by abuses of power both at national and international level, because the well-being of persons is the ultimate end of law, nationally and internationally. Yet, in order to function, rule of law needs efficient checks and balances.

²²⁰ Maduro, Miguel Poiars, *Legal Travels and the Risk of Legal Jet-Lag: The Judicial and Constitutional Challenges of Legal Globalisation*, In: Monti, Mario et. al. (Eds.), *Economic Law and Justice in Times of Globalisation: Festschrift for Carl Baudenbacher*, Baden-Baden, 2007, p. 177.

²²¹ I.e., a combination of the definitions of Francesco Francioni (p. 1) and Cândido Rangel Dinamarco (p. 115).

²²² Cappelletti, et al, 2002, p. 11 f.

²²³ Cappelletti also considers access to justice as the most important human right. I, however, disagree. As I have already explained in the section ‘Access to Justice as a Constitutional Right’, I believe that, in order for the right of access to justice to exist, and for a person to really enjoy that right, other rights must previously exist, like the recognition of a person as a person before the law, liberty, dignity and non-discrimination of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. These rights are foreseen in Articles 6, 1 and 2 of the Universal Declaration of Human Rights.

Chapter II

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The Legislative Dimension of Access to Justice

1. Introduction to Chapter II

This chapter links ‘access to justice’ to ‘trade’ and ‘multilevel trade regulation’, and becomes, in consequence, essential to comprehend the subsequent chapters of this thesis. Moreover, it also provides an overview of trade law at all its levels – i.e., national, regional, international and supranational – besides the constitutional aspects related to each. The chapter’s first section, however, examines economic justice.

2. Economic Justice

There are several abstract definitions of economic justice. In this section, I will present and explain one that is explicit and precise. This is important in order to investigate access to justice as a legislative right in multilevel trade regulation and multilevel judicial protection of access to justice in trade regulation, which are the next sections that integrate the present chapter.

For *Gewirth*, economic justice is one of the most controversial subjects of moral philosophy,²²⁴ and he explains why as follows:

“As a first approximation, justice may be characterized as being concerned with who should get what, and why. In economic justice the ‘what’ in question consists in economic goods, and controversy rages especially over the ‘why’ – the criteria for determining who should get these goods. The controversy is particularly intense because of the great importance of economic goods for human life and well-being and

²²⁴ Gewirth, Alan, *Economic Justice: Concepts and Criteria*, in: Kipnis, Kenneth/Meyers, Diana T. (Eds.), *Economic Justice: Private Rights and Public Responsibilities*, Totowa, NJ, Rowman & Allanheld, 1985, p. 7.

because the distribution of these goods is a crucial mark of the moral status and basic values of any society.”²²⁵

*Figueiredo*²²⁶ argues that to the law is reserved the role of establishing norms and operationalising a legal system that ensures a reasonable and proportional reallocation of resources in order that economic growth objectifies social development. For him, there is no ‘fair price’ for products, but a ‘price optimisation’ or an ‘optimal price’, which is the one that will ensure a larger number of commercial transactions and, as a result, allow that a larger number of people can meet their needs.²²⁷ In addition, in view of the fact that individuals have different skills, capacities and opportunities to generate and accumulate wealth, both governments and the law have to ensure that economic growth really creates social development. With regard to that, it is worth citing *Rawls*, according to whom:

“a convincing account of basic rights and liberties, and of their priority, was the first objective of justice as fairness. A second objective was to integrate that account with an understanding of democratic equality, which led to the principle of fair equality of opportunity and the difference principle.”²²⁸⁻²²⁹

One can easily see *Rawls*’ principles of justice above, namely the principle of basic rights and liberties, the principle of fair equality of opportunity and the difference principle.

According to *Figueiredo*, social inequalities among citizens do not necessarily characterise injustice, as social differences are legitimate.²³⁰ This goes back to *Rawls*, as he stresses that “each person benefits from permissible inequalities”.²³¹ So, it can

²²⁵ *Ibid.*, p. 7.

²²⁶ Figueiredo, Leonardo V., *Direito econômico internacional: análise jurídica do projeto das Nações Unidas para o desenvolvimento do milênio e da crise financeira de 2008*, Rio de Janeiro, Forense, 2011, p. 38.

²²⁷ Figueiredo, p. 38.

²²⁸ Rawls, John, *A theory of justice*, Cambridge, 1999, p. xii.

²²⁹ It is important to clarify that ‘justice as fairness’ is the conception of justice that Rawls presents in his book *A Theory of Justice*.

²³⁰ Figueiredo, p. 50.

²³¹ Rawls, John, 1999, p. 56.

be implied that it is a question of reasonableness, and the wealthiest part of a society should not deprive the less wealthy to have access to primary goods. There must be a balance in economic relations so that there is the development of peoples with the solidification of human rights. In short, people are entitled to economic justice.

Besides what has already been pointed out above, one must bear in mind two important aspects. Firstly, people are entitled to economic goods like employment opportunities, income, wealth and so forth. Secondly, people being entitled to economic goods means that the latter must be respected and protected. According to Meyers,²³² this may involve arrangements to maximise satisfaction, identification and prevention of tyranny, the conception of a social ideal or the definition and seeking of specific forms of liberty and equality.

With respect to economic justice at the international level, the structure of the international economic order was initially created within a more liberal perspective, and international economic justice initially meant only the increased flow of income and wealth for the developing countries. However, international economic justice is more than that.²³³ As Figueiredo explains, the rationalisation and harmonisation of the protection of domestic economies with regard to foreign trade operations represent a great challenge for economic justice.²³⁴ Petersmann has expressed this very well in one of his most recent works:

“(a)s international trade and trade law are mere instruments for enabling citizens to satisfy human demand for scarce goods and services through mutually beneficial cooperation among citizens across frontiers, promoting the mutual consistency of international trade law and human rights is important also for poverty reduction and for strengthening the moral and democratic legitimacy of international economic law.”²³⁵

²³² Meyers, Diana T., *Reason, Unreason and Economic Justice*, in: Kipnis, Kenneth/Meyers, Diana T. (Eds.), *Economic Justice: Private Rights and Public Responsibilities*, Totowa, 1985, p. 2.

²³³ Figueiredo, p. 100.

²³⁴ *Ibid.*, p. 98.

²³⁵ Petersmann, Ernst-Ulrich, *International Trade Law and Human Rights: The ILA's 2008 "Rio de Janeiro Declaration"*, in: Bhuiyan, Sharif/Sands, Philippe/Schrijver, Nico (Eds.), *International Law*

It can be concluded, therefore, that *Häberle*'s 'cooperative constitutional State' model²³⁶ is the most appropriate to overcome the challenges facing an international economic justice. This is because economic growth must also bring social achievement and social improvement for less wealthy societies and, therefore, reduce extreme poverty. But how? Through laws and policies of cooperative constitutional States that are trading partners – in other words, through trade activities that do not represent economic and social dangers, especially for developing countries. It is all about generating economic growth among States that are trading partners without disrespecting the rights of their national communities and, therefore, making economic justice at global level possible. Nonetheless, it is even more complicated than that, as the WTO and regional organisations like the MERCOSUR must also contribute towards economic justice, as they regulate and control economic activities among countries at regional and global levels. This brings *Petersmann* and *Maduro* back to the fore. In *Petersmann*'s words, economic law "is conceived as the engine of global integration and its emerging constitutionalism"²³⁷ and, according to *Maduro*, "the way to promote global constitutionalism is by extending the scope and application of international trade law, human rights documents and dispute-settlement mechanisms."²³⁸ Thus, the WTO and MERCOSUR play key roles in international economic justice and have the potential for both promoting and jeopardising it.²³⁹

3. Access to Justice as a Legislative Right in Multilevel Trade Regulation

The Westphalian State has weakened. This weakening was the result of a series of reasons. Firstly, after World War II, many organisations have been created at the

and Developing Countries: Essays in Honour of Kamal Hossain, Leiden/Boston, Brill Nijhoff, 2014, p. 83.

²³⁶ A cooperative constitutional State is the State that finds its identity also in international law, in the intertwining of international and supranational relations, in the perception of international cooperation and international responsibility as well as in the field of solidarity (*Häberle*, 2007, p. 4). For more details, see the section of this thesis named 'Constitutionalism'.

²³⁷ *Petersmann*, Ernst-Ulrich, *How to Reform the UN System? Constitutionalism, International Law and International Organizations*, In: *Leiden Journal of International Law*, Vol. 10, 1997, p. 445.

²³⁸ *Maduro*, Miguel Poiates, *Legal Travels and the Risk of Legal Jet-Lag: The Judicial and Constitutional Challenges of Legal Globalisation*, In: *Monti*, Mario et. al. (Eds.), *Economic Law and Justice in Times of Globalisation: Festschrift for Carl Baudenbacher*, Baden-Baden, 2007, p. 179.

²³⁹ For specific details concerning the WTO and the Mercosur regarding the challenges mentioned and other details, please see the respective chapters of this thesis.

international level in order to regulate issues of common interest in the international community. These organisations interconnected Nation States in political, economic and social aspects, giving rise, as a consequence, to a ‘global governance’ without a ‘global government’. Secondly, technological developments brought profound changes to the lives of peoples. Thirdly, multinational companies intensified the integration and interdependence of national economies, markets and financial markets through more trade and services, besides higher competition. Although the effects of the globalisation phenomenon on Nation States are not the same due to different historical, social, cultural, political, and economic factors, the result is that national governments partly lost authority and control over certain activities. Furthermore, credit-rating agencies like, for instance, Moody’s and Standard and Poor’s, define today the credit figures of not only companies but also national governments worldwide.²⁴⁰ Thus, globalisation weakened the Westphalian State, which had to learn to conform to an international system made of different actors – some of which were even non-governmental and private – that became increasingly influential with regard to global and national policies. These actors influence States individually and weaken their ‘freedom’ to rule self-sufficiently in their territories.

Economic policy and law are key elements of national and international trade. They are not always in dialogue with each other, but need to be. If States want to increase international trade (an economic policy issue), their legal systems need first to allow it (a law issue). This is a basic requirement of the law of democratic countries. In fact, the law is also expected to provide a dynamic mechanism to solve disputes likely to arise from trade activities²⁴¹ and, successively, ensure access to justice. Externally, economic integration is a privileged instrument for regional and global inclusion. However, it is the law, and not politics, that builds the strongest connections and most stable integrations. The deepening of an integration process among countries and the creation and preservation of fundamental freedoms like economic circulation require

²⁴⁰ For further details, see McGrew, Anthony, *Globalization and global politics*, In: Baylis, John et al. (Eds.), *The globalization of world politics: an introduction to international relations*, 5th ed., Oxford, Oxford University Press, 2010, pp. 14-31; Brown, Seyom, *International relations in a changing global system: toward a theory of the world polity*, Boulder, Westview Press, 1992.

²⁴¹ Nevertheless, there are agreements without dispute resolution mechanisms. An example is the Preferential Trade Agreement (PTA) between Canada and the United States that is known as ‘Canada-U.S. auto pact’. It was created in 1965 to eliminate Canadian and U.S. tariffs on transborder shipments of completed vehicles and original equipment parts.

the surpassing of the simple elimination of tariff and non-tariff barriers (negative approach) to create a new and appropriate legal order (positive approach) in the integrated region.²⁴² As *Petersmann* summarises, human welfare depends on institutionalising reasonable rules and institutions protecting open markets.²⁴³

In the twentieth century, after two world wars, the European Communities and the European Union are unquestionable examples of success, and, in different parts of the world, economic blocs have also been created. In South America, for instance, the MERCOSUR was established. But, unlike the EU, the MERCOSUR has adopted a more moderate position regarding its institutions and substantive legal rules. As a consequence, the MERCOSUR Member States have abdicated very little their national sovereignties and did not give the emphasis that they could to the process of economic integration. *Petersmann* explains part of this scenario and provides some empirical data:

“European integration has demonstrated that inter-state treaties – like those establishing the EU, the EEA, and the European Convention on Human Rights (ECHR) – can be successfully transformed into ‘multilevel constitutional systems’ protecting international public goods like a common market among the 30 EEA Member States, transnational rule of law, protection of human rights, ‘democratic peace’, and social welfare for the benefit of 550 million European citizens. Outside Europe, however, most governments continue insisting on ‘state sovereignty’ and are eager to avoid legal and judicial accountability vis-à-vis domestic citizens for welfare-reducing violations of international guarantees of freedom, non-discrimination, and rule of law.”²⁴⁴

With the formation of supra-State alternative powers to deal with legal issues, among which include economic law issues that relate to life in a globalised world,

²⁴² For more details, see Franca Filho, Marçilio Toscano, *O Silêncio Eloquente: Omissão do Legislador e Responsabilidade do Estado na Comunidade Européia e no Mercosul*, Coimbra, 2008, p. 377.

²⁴³ Petersmann, Ernst-Ulrich, *International Economic Law in the 21st Century: Constitutional Pluralism and Multilevel Governance of Interdependent Public Goods* (Oxford and Portland, Oregon, Hart 2012), p. 2.

²⁴⁴ Petersmann, 2011, p. 29.

contemporary Nation States must adapt to the new circumstances that are outside their respective national territories. Moreover, the Westphalian State has partly lost its public ability for promoting public goods.²⁴⁵ But what are public goods? Economists tend to define a ‘public good’ as a type of good that is non-excludable and non-rivalrous and, therefore, benefits all citizens – i.e., people cannot be excluded by governments from using the good, and the use of it by one person does not decrease its availability.²⁴⁶ One among many examples is traffic lights. Although they are produced by companies and sold, the regime of traffic lights is a public good, because well-functioning traffic lights and obedient drivers and pedestrians create non-excludable and non-rivalrous benefits. There is no exclusion of users for the traffic lights and the use of traffic lights by more or less people does not decrease their availability.²⁴⁷ Another example is peace, because, once it has been created in a country, its enjoyment cannot be restricted by governments.²⁴⁸ Petersmann emphasises that public goods:

“need to be supplied by non-discriminatory government regulation (such as competition and trade rules, social rights) that must be constitutionally restrained by legal and judicial safeguards of human rights and democratic governance institutions, without restricting mutually beneficial international trade.”²⁴⁹

The concept of ‘global public good’ includes both the non-excludability and non-rivalry characteristics and has the additional feature that the good exists worldwide or should be collectively provided worldwide by governments. It has to be noted thereby that human rights, democracy and rule of law are also examples of global public goods. I would go even further by considering that the law is both a global public

²⁴⁵ For details on the declining ability of States to provide public goods, see e.g. Cerny, Philip G., *Globalization and the Changing Logic of Collective Action*, in: *International Organization*, Vol. 49, Issue 4, 1999, pp. 595-625.

²⁴⁶ For details, see Varian, Hal R., *Microeconomic Analysis*, New York, Norton, 1992.

²⁴⁷ Kaul, Inge/Grunberg, Isabelle/Stern, Marc A. (Eds.), *Global Public Goods: International Cooperation in the 21st Century*, New York, Oxford University Press, 1999, p. 4, which can be found at <http://web.undp.org/globalpublicgoods/TheBook/globalpublicgoods.pdf>. Date of access: 27th March 2014.

²⁴⁸ *Ibid.*

²⁴⁹ Petersmann, Ernst-Ulrich, *International Trade Law and Human Rights: The ILA’s 2008 “Rio de Janeiro Declaration”*, in: Bhuiyan, Sharif/Sands, Philippe/Schrijver, Nico (Eds.), *International Law and Developing Countries: Essays in Honour of Kamal Hossain*, Leiden/Boston, Brill Nijhoff, 2014, p. 83.

good and a means of achieving two other global public goods, namely access to justice and, in consequence, also justice. In the words of *Kaul, Grunberg and Stern*, a pure global public good “is marked by universality – that is, it benefits all countries, people and generations”.²⁵⁰ In practice, however, many public goods are degraded, overused, underproduced, undersupplied or subject to restrictions.²⁵¹ In the view of the authors just mentioned, this is because markets are good at providing private goods but not public goods²⁵² and because States behave internationally like private actors, namely by their self-interests.²⁵³ *Petersmann* to some extent agrees with this interpretation when he argues that “[v]irtually all governments give priority to protecting *national* rather than international public goods”.²⁵⁴ For him, national public goods can only be supplied democratically “in a framework of constitutional, legislative, administrative, and judicial rules and procedures supported by domestic citizens”.²⁵⁵ With regard to global public goods, he believes that a “multilevel governance of ‘international public goods’ requires a multilevel constitutional framework for multilevel rule-making and judicial protection of rule of law and constitutional rights supported by domestic citizens as ‘primary’ legal subjects of IEL”.^{256 - 257} Yet, legal analysis of the international regulation of public goods, differently from the long-term economic analysis of public goods, remains rare.²⁵⁸ The same author argues that national and international public goods are intertwined and an inadequate regulation of international public goods risks undermining national public goods.²⁵⁹

²⁵⁰ Kaul, Inge et al, p. 11.

²⁵¹ For details, see *Ibid*, pp. 2-16.

²⁵² *Ibid.*, p. 7.

²⁵³ *Ibid.*, p. 15.

²⁵⁴ Petersmann, Ernst-Ulrich, *International Economic Law, ‘Public Reason’, and Multilevel Governance of Interdependent Public Goods*, in: *Journal of International Economic Law*, Vol. 14, Nr. 1, 2011, p. 25.

²⁵⁵ *Ibid.*, p. 23.

²⁵⁶ *Ibid.*

²⁵⁷ The acronym ‘IEL’ used by the author means ‘international economic law’.

²⁵⁸ Petersmann, 2011, p. 24, footnote 1. The author quotes Drahos, Peter, *The Regulation of Public Goods*, in: Maskus, Keith E./Reichman, Jerome H. (Eds.), *International Public Goods and Transfer of Technology Under a Globalized Intellectual Property Regime* (Cambridge, Cambridge University Press, 2005), pp. 46-64.

²⁵⁹ *Ibid.*, p. 25. The author cites as an example the millions of jobless people generated and trillions of U.S. Dollars in investments that were lost because of the financial crises since 2008.

*Cerny*²⁶⁰ explains that public goods can be divided in 3 categories: (a) regulatory goods, (b) productive/distributive goods, and (c) redistributive goods. According to this classification, ‘regulatory goods’ includes property rights, trade protection, the abolition of internal barriers to production, a stable currency system and a legal system to enforce contracts. The category ‘productive/distributive goods’ includes, for instance, different types of direct and indirect State controlled and State sponsored production and distribution activities. The category ‘redistributive goods’ involves, for example, welfare and employment services and the protection of the environment. *Petersmann*, however, argues that economists and political scientists tend to differentiate public goods in 3 other major varieties – i.e., ‘single best efforts public goods’, ‘weakest link public goods’ and ‘aggregate public goods’ – which he explains as follows:

- “(i) ‘Single best efforts public goods’ may be supplied unilaterally or ‘minilaterally’, for instance by investing in the development of medicines (such as polio vaccine) for preventing pandemics and by engineering technology for avoiding other potential catastrophes (such as ‘geoengineering’ as an option for preventing climate change).
- (ii) ‘Weakest link public goods’ may be undermined if one or a few state(s) (for example poor or ‘failed states’) do not cooperate, for instance in polio eradication as a global public good or in nuclear non-proliferation and control of other weapons of mass destruction.
- (iii) ‘Aggregate efforts public goods’ can be supplied only through collective action, which may not come about without incentives for cooperation and sanctions of non-cooperation. (...) their collective supply tends to be confronted not only with numerous ‘collective action problems’ like ‘free-riding’ and other ‘prisoner-dilemmas’. Global aggregate public goods also tend to be composed of numerous national and regional public goods and to interact with functionally related, other public goods. For instance, an efficient world trading system – which may be conceptualized as a non-rival and non-excludable public good beneficial for all consumers and trading

²⁶⁰ Cerny, 1999, pp. 595-625.

countries (in contrast to the WTO or free trade agreements as ‘club goods’) – cannot properly function without a liberal (ie, liberty-based) legal and dispute settlement and international payments system (as ‘intermediate public goods’).”²⁶¹

One can, as a consequence, clearly see that public goods are even more complex to understand and differentiate.

In multilevel trade regulation, there are different legal rules at different legal systems regulating, or trying to regulate, trade and services. Besides the law of Nation States, there are different international organisations,²⁶² treaties and conventions. This framework makes access to justice, which is, as I have argued, a global public good, a complex task, especially if a Member of a particular organisation is also a Member of other organisations that regulate the same or similar issues.

Given that there is no doubt about the existence of global public goods, global public goods must be protected at global level – in other words, by organisations at regional level (e.g., the EU and the MERCOSUR) and also organisations at global level (e.g., the UN and also the WTO). But, instead of binding precedents, the WTO has *de facto* precedents and has no particular standard of review for cases dealing with public goods.²⁶³ With regard to a ‘precedent rule’ at the WTO, *Jackson* argues that:

“[t]he WTO Appellate Body has avoided using the term “precedent”, but in a number of cases the AB has made it clear that panels and AB activity expect consistency and predictability in its jurisprudence. This is perhaps most notable in the case of US Final Anti-Dumping Measures on Stainless Steel from Mexico.”²⁶⁴

²⁶¹ Petersmann, 2012, p. 25.

²⁶² The EU is supranational.

²⁶³ Personal notes taken at a seminar on WTO law conducted by Professor Petros C. Mavroidis in the autumn of 2011 at the European University Institute in Florence, Italy.

²⁶⁴ Jackson, John H., *Constitutional Treaties: Institutional Necessity and Challenge to International Law Fundamentals*, in: Cremona, Marise/Hilpold, Peter/Lavranos, Nikos/Staiger Schneider, Stefan/Ziegler, Andreas R. (Eds.), *Reflections on the Constitutionalisation of International Economic Law: Liber Amicorum for Ernst-Ulrich Petersmann*, Leiden/Boston, Brill, 2014, p. 199.

Back to the issue of access to justice, it is worth reiterating that it is also a global public good. Hence, all States should promote it through all organisations that they are Members of. Representatives of governments, including diplomats, should become ‘agents’ in the promotion of access to justice, because, among other reasons, they have responsibilities towards society. Furthermore, interdependencies created by international organisations and globalisation demand minimum standards of public goods protection. Concerning Panel and Appellate Body rulings, the most efficient way to promote access to justice seems to be through consistent interpretation based on human rights and basic freedoms, and the development of an international rule of law. Even though new WTO precedents will still be officially not binding, a sort of ‘new legal culture’ at the WTO dispute settlement mechanism can bring progress and have, in addition, the potential of being taken into consideration in similar future cases again and again. No binding effect is unimportant if Panel and Appellate Body arbitrators have a legal culture that benefits the well-being of persons rather than political interests among countries. In the end, the well-being of persons is the ultimate end of the law. Given that the WTO is not tied to any particular national legal tradition and its legal culture can be improved through consistent interpretation, creating a ‘new legal culture’ among WTO arbitrators could be easier than one might imagine. This important shift is much more a matter of willingness and coherence for the benefit of citizens than anything else.

With specific regard to access to the WTO dispute settlement mechanism, even though there is an Advisory Centre on WTO Law (ACWL) that provides free legal advice, the WTO is not a free forum for all its Members due to its rising costs over time, voluminous protocols and a necessary high degree of legal expertise to be a claimant and defendant at Panel and Appellate Body levels. The ACWL provides free legal advice only to ‘least-developed countries’ designated as such by the United Nations.²⁶⁵ ‘Least-developed country’ is a classification below ‘developing country’.

²⁶⁵ According to the UN Office of the High Representative for the Least Developed Countries, Landlocked Developing Countries and Small Island Developing States (<http://unohrrls.org/about-ldcs/criteria-for-ldcs/>), for a country to be considered least-developed, it must fulfil the following criteria:

1. *Low-income criterion*, based on a three-year average estimate of GNI per capita, based on the World Bank Atlas method (under US\$992 for inclusion, above US\$ 1,190 for graduation as applied in the 2012 triennial review).

Among the current 159 WTO Members, there are 33 least-developed countries (besides, there are also 10 countries in the process of acceding to the WTO that can already benefit from the free legal advice provided by the ACWL).²⁶⁶ In practice, however, least-developed countries are not major players in international trade and do not use the WTO dispute settlement mechanism as often as developing countries, emerging countries and developed countries. Hence, the WTO is a free forum only for least-developed countries and WTO Members who can pay for all the involved costs.²⁶⁷

3.1. Market Freedom

In democracies, market freedom should be a fundamental right and, as such, allow access to justice. The Brazilian and German federal constitutions have similar articles about market freedom and, as a result, it is worth comparing them. In fact, the relationship between the Brazilian and German constitutions is nothing new, as the Brazilian federal constitution of 1934 was the first one in the country to be influenced by the ‘*Weimarer Verfassung*’ of 1919 (the ‘Weimar Constitution’) concerning an economic and social order.²⁶⁸ As a liberal and also democratic *Magna Carta*, the

2. *Human Assets Index (HAI)* based on indicators of: (a) nutrition: percentage of population undernourished; (b) health: mortality rate for children aged five years or under; (c) education: the gross secondary school enrolment ratio; and (d) adult literacy rate.

3. *Economic Vulnerability Index (EVI)* based on indicators of: (a) population size; (b) remoteness; (c) merchandise export concentration; (d) share of agriculture, forestry and fisheries in gross domestic product; (e) share of population living in low elevated coastal zones; (f) instability of exports of goods and services; (g) victims of natural disasters; and (h) instability of agricultural production.

²⁶⁶ For details, visit the official website of the Advisory Centre on WTO Law at the address http://www.acwl.ch/e/ld_countries/ld_countries.html. Date of access: 8th April 2014.

²⁶⁷ Cappelletti and Garth argued back in 1978 in the first volume of their classic work that costs represent the most significant barrier to access to justice. For details, see Cappelletti, Mauro/Garth, Bryant (Eds.), *Access to Justice*, Vol. 1, Milano, A. Giuffrè, 1978.

²⁶⁸ Weimar Constitution’s articles 151 and 152 of its chapter on the economy (chapter five) are worth being transcribed.

“Artikel 151

Die Ordnung des Wirtschaftslebens muß den Grundsätzen der Gerechtigkeit mit dem Ziele der Gewährleistung eines menschenwürdigen Daseins für alle entsprechen. In diesen Grenzen ist die wirtschaftliche Freiheit des Einzelnen zu sichern.

Gesetzlicher Zwang ist nur zulässig zur Verwirklichung bedrohter Rechte oder im Dienst überragender Forderungen des Gemeinwohls.

Die Freiheit des Handels und Gewerbes wird nach Maßgabe der Reichsgesetze gewährleistet.”

(Article 151

The economy has to be organized based on the principles of justice, with the goal of achieving life in dignity for everyone. Within these limits the economic liberty of the individual is to be secured.

Weimar Constitution was influential in the writings of constitutions around the world. Specifically with reference to the economic and social order, the Weimar Constitution influenced, for instance, the Spanish Constitution of 1931, the Brazilian Constitution of 1934, the Italian Constitution of 1948, and the German Constitution of 1949.²⁶⁹ One can see, as a result, that the Weimar Constitution was influential both before and after World War II. Nowadays, in Brazil, numerous jurists continue to be fascinated by recent works of both legal doctrine and jurisprudence in Germany, especially regarding fundamental rights issues.²⁷⁰ Nevertheless, while the current German constitution – also known as the German Basic Law – has precise guarantees of fundamental economic liberties, in the current Brazilian Constitution they have been placed under different titles²⁷¹ and most do not have the status of fundamental rights or liberties. The rights contained in the German constitution are the following:

- every person shall have the right to free development of his personality insofar as he does not violate the rights of others or offend against the constitutional order or the moral law;²⁷²
- every person shall have the right to life and physical integrity; and freedom of the person shall be inviolable;²⁷³
- all Germans shall have the right to form corporations and other associations;²⁷⁴
- all Germans shall have the right freely to choose their occupation or profession, their place of work and their place of training;²⁷⁵⁻²⁷⁶

Legal force is permissible to realize threatened rights or in the service of superseding demands of public welfare.

Freedom of trade and industry will be realized according to a Reich law.)

“Artikel 152

Im Wirtschaftsverkehr gilt Vertragsfreiheit nach Maßgabe der Gesetze. Wucher ist verboten.

Rechtsgeschäfte, die gegen die guten Sitten verstoßen, sind nichtig.”

(Article 152

Freedom of contract is the foundation of economic transactions, according to the laws. Usury is prohibited. Legal transactions offending good manners are invalid.)

²⁶⁹ Da Rosa Júnior, Faustino, *A Constituição Econômica Brasileira*, in: *Jurisway*, March 2011, to be found at http://www.jurisway.org.br/v2/dhall.asp?id_dh=5538 . Date of access: 30th November 2013.

²⁷⁰ Grimm, Dieter, *Constituição e Política*, Belo Horizonte, Editora del Rey, 2006, p. 86.

²⁷¹ Art. 1, IV; Art. 3, II and III; Art. 4, II, III, VII, IX and its sole paragraph; Art. 5, XIII; Art. 5, XXII, and Art. 170.

²⁷² Art. 2 (1): *Jeder hat das Recht auf die freie Entfaltung seiner Persönlichkeit, soweit er nicht die Rechte anderer verletzt und nicht gegen die verfassungsmäßige Ordnung oder das Sittengesetz verstößt.*

²⁷³ Art. 2 (2): *Jeder hat das Recht auf Leben und körperliche Unversehrtheit. Die Freiheit der Person ist unverletzlich. In diese Rechte darf nur auf Grund eines Gesetzes eingegriffen werden.*

²⁷⁴ Art. 9 (1): *Alle Deutschen haben das Recht, Vereine und Gesellschaften zu bilden.*

²⁷⁵ But, the practice of an occupation or profession may be regulated by or pursuant to a law.

- no person may be required to perform work of a particular kind except within the framework of a traditional duty of community service that applies generally and equally to all,²⁷⁷
- property and the right of inheritance shall be guaranteed.²⁷⁸

With regard to Brazil, according to Art. 1, IV of its *Magna Carta*,²⁷⁹ the Federative Republic of Brazil, formed by the indissoluble union of the states and municipalities and of the Federal District, is a legal democratic State and is founded on the social values of labour and of free enterprise.²⁸⁰ Art. 3, I, II and III define that the fundamental objectives of the Federative Republic of Brazil are to build a free, just and solidary society, to guarantee national development and to eradicate poverty and substandard living conditions and to reduce social and regional inequalities.²⁸¹ Art. 4, II, III, VII, IX and its sole paragraph determine that the international relations of the Federative Republic of Brazil are governed by the following principles: prevalence of human rights, self-determination of the peoples, peaceful settlement of conflicts, cooperation among peoples for the progress of mankind, and the Federative Republic of Brazil shall seek the economic, political, social and cultural integration of the peoples of Latin America, viewing the formation of a Latin-American community of nations.²⁸² Art. 5, XIII²⁸³ defines that the practice of any work, trade or profession is

²⁷⁶ Art. 12 (1): *Alle Deutschen haben das Recht, Beruf, Arbeitsplatz und Ausbildungsstätte frei zu wählen. Die Berufsausübung kann durch Gesetz oder auf Grund eines Gesetzes geregelt werden.*

²⁷⁷ Art. 12 (2): *Niemand darf zu einer bestimmten Arbeit gezwungen werden, außer im Rahmen einer herkömmlichen allgemeinen, für alle gleichen öffentlichen Dienstleistungspflicht.*

²⁷⁸ Art. 14 (1): *Das Eigentum und das Erbrecht werden gewährleistet.*

²⁷⁹ Articles 1 to 4 belong to title 1 and are about the fundamental principles of the country.

²⁸⁰ Art. 1. *A República Federativa do Brasil, formada pela união indissolúvel dos Estados e Municípios e do Distrito Federal, constitui-se em Estado Democrático de Direito e tem como fundamentos:*

(...)

IV - os valores sociais do trabalho e da livre iniciativa;

²⁸¹ Art. 3. *Constituem objetivos fundamentais da República Federativa do Brasil:*

I - construir uma sociedade livre, justa e solidária;

II - garantir o desenvolvimento nacional;

III - erradicar a pobreza e a marginalização e reduzir as desigualdades sociais e regionais;

²⁸² Art. 4. *A República Federativa do Brasil rege-se nas suas relações internacionais pelas seguintes princípios:*

(...)

II - prevalência dos direitos humanos;

III - autodeterminação dos povos;

(...)

VII - solução pacífica dos conflitos;

(...)

IX - cooperação entre os povos para o progresso da humanidade;

(...)

free, observing the professional qualifications which the law shall establish²⁸⁴ (i.e., exactly the same content of Art. 12 (1) of the German Constitution). Furthermore, item XXII of Art. 5 also establishes that the right of property is guaranteed²⁸⁵ (i.e., precisely the same content of Art. 14 (1) of the German Constitution), and Art. 170, which belongs to title VII about the economic and financial order, determines that the economic order, founded on the appreciation of the value of human work and on free enterprise, is intended to ensure everyone a life with dignity.²⁸⁶⁻²⁸⁷ So, one can see that the wording of some articles of the Brazilian Constitution is similar to articles of the German Constitution and the main difference pertains to the ‘ranking’ of the articles inside the Brazilian Constitution. To be exact: only Art. 5 is under the title about fundamental rights and guarantees.

But, in the end, is market freedom a fundamental right in Brazil? Art. 5, XIII allows one to answer in the affirmative, as it establishes that the practice of any work, trade, or profession is free. Nevertheless, while free enterprise (Art. 170) is under title VII about the country’s economic and financial order, articles 3 and 4 are under title I

Parágrafo único. A República Federativa do Brasil buscará a integração econômica, política, social e cultural dos povos da América Latina, visando à formação de uma comunidade latino-americana de nações.

²⁸³ Art. 5 is very long, belongs to title II about ‘fundamental rights and guarantees’ and presents a list of individual and collective rights and duties.

²⁸⁴ Art. 5. *Todos são iguais perante a lei, sem distinção de qualquer natureza, garantindo-se aos brasileiros e aos estrangeiros residentes no País a inviolabilidade do direito à vida, à liberdade, à igualdade, à segurança e à propriedade, nos termos seguintes:*

(...)

XIII - *é livre o exercício de qualquer trabalho, ofício ou profissão, atendidas as qualificações profissionais que a lei estabelecer;*

²⁸⁵ XXII - *é garantido o direito de propriedade.*

²⁸⁶ Art. 170. *A ordem econômica, fundada na valorização do trabalho humano e na livre iniciativa, tem por fim assegurar a todos existência digna...*

²⁸⁷ This is the complete text of Art. 170 in English:

The economic order, founded on the appreciation of the value of human work and on free enterprise, is intended to ensure everyone a life with dignity, in accordance with the dictates of social justice, with due regard for the following principles:

I - national sovereignty;

II - private property;

III - the social function of property;

IV - free competition;

V - consumer protection;

VI - environment protection, including by means of different treatments in accordance to the environmental impact of products and services and their respective production and rendering;

VII - reduction of regional and social differences;

VIII - pursuit of full employment;

IX - preferential treatment for small enterprises organized under Brazilian laws and having their head-office and management in Brazil.

Sole paragraph - Free exercise of any economic activity is ensured to everyone, regardless of authorization from government agencies, except in the cases set forth by law.

about the fundamental principles of Brazil. Regardless of that, Art. 5, XIII has preference, for the reason that it lists fundamental rights.

Concerning the MERCOSUR, market freedom is definitely one of its purposes, as the participating countries committed themselves to establishing a common market involving the free movement of goods, services and factors of production between countries through, *inter alia*, the elimination of customs duties and non-tariff restrictions on the movement of goods, and any other equivalent measures.²⁸⁸ So, considering that the Brasília, Ouro Preto and Olivos protocols have no additional details concerning this issue – i.e., if market freedom in the MERCOSUR is a fundamental right or not –, I believe that the fact that it is a major purpose obliges the governments of the MERCOSUR Member States and, therefore, the Brazilian government and its national courts have to permit its natural and legal persons to have access to a free market in the MERCOSUR. Even if market freedom is not a MERCOSUR fundamental right (let us presume that it is just a purpose), one should not forget that Art. 5, XIII of the Brazilian Constitution establishes the freedom to practice any work and to trade as fundamental rights. In addition, the sole paragraph of Art. 4 says that Brazil shall seek the economic, political, social and cultural integration of the peoples of Latin America, viewing the formation of a Latin-American community of nations. So, the combination of these articles plus the aims of the MERCOSUR do make, at least for Brazilian natural and legal persons, market freedom a fundamental right within the bloc. But, as will be explained in the chapter concerning the MERCOSUR, the pro-MERCOSUR interpretation of the sole paragraph of Art. 4 is in the hands of Brazil's national judges, and, at MERCOSUR level, *Ad Hoc* arbitral tribunals are expected to protect market freedom within the MERCOSUR area. In fact, in a case brought by Uruguay against Argentina,²⁸⁹ for instance, the MERCOSUR Permanent Court of Review stated that the principle of highest importance in an integration system such as the MERCOSUR is free trade.

At WTO level and, as a result, at global level, the issue becomes more complicated. This is because the WTO does not address human rights, and has never discussed the

²⁸⁸ For more details, see Art. 1 of the Treaty of Asunción.

²⁸⁹ *Uruguay v Argentina-Import prohibition of remoulded tyres from Uruguay*, TPR decision on 25th October 2005.

right to property²⁹⁰ and freedom of contract. While a mere UN resolution does not as a rule transform a specific right (e.g., the right to property) into a human right, the 1948 Universal Declaration of Human Rights has elements of *jus cogens*. Although it is not a treaty and is not formally mandatory, it does contain substantive obligations and establish States' duties. Since this is a controversial issue, I will go into greater detail. With reference to *jus cogens* (or 'compelling law' in the literal translation to English), it can be argued that it refers to a category of norms of international law which have a special normative power that agreements, conventions, covenants and contracts cannot deviate from.²⁹¹ Raffener defends that only an inclusion of peremptory norms in the practice of States respects the will of States and connects the process of creation of peremptory norms to one of the two classical sources of international law: customary law.^{292 - 293} Higgins explains that "international human rights treaties undoubtedly contain elements that are binding as principles which are recognized by civilized States, and not only as mutual treaty commitments", but, also in the words of the same author, "neither the wording of the various human rights instruments nor the practice thereunder leads to the view that all human rights are *jus cogens*."²⁹⁴ For Lillich, "*jus cogens* denotes a peremptory norm of international law binding on all states at all times and so fundamental that it may not be overridden by any rule that any one or more states may seek to establish by treaty or custom."²⁹⁵ Marceau has an

²⁹⁰ The right to property is a fundamental right in all democratic countries, besides a human right as well.

Art. 17 (1) of the Universal Declaration of Human Rights: Everyone has the right to own property alone as well as in association with others.

²⁹¹ In this sense, Raffener, Stefan, *Wege der Konstitutionalisierung im Völkerrecht: Vorrang der UN-Charta und ius cogens*, in: Pernice, Ingolf/Müller, Manuel/Peters, Christopher (Eds.), *Konstitutionalisierung jenseits des Staates: zur Verfassung der Weltgemeinschaft und den Gründungsverträgen internationaler Organisationen*, Baden-Baden, Nomos, 2012, p. 50. More details can also be found in Focarelli, Carlo, *Promotional Jus Cogens*, in: *Nordic Journal of International Law*, Nr. 77, 2008, pp. 429-459 and Frowein, Jochen A., *Ius Cogens*, in: *Max Planck Encyclopedia of Public International Law*, Heidelberg, 2008.

²⁹² "Nur eine Verankerung zwingender Normen in der Staatenpraxis respektiert den Willen der Staaten und verbindet den Entstehungsprozess zwingender Normen mit einer der beiden klassischen Quellen des Völkerrechts: dem Gewohnheitsrecht."

²⁹³ Raffener, p. 51.

²⁹⁴ Higgins, Roslyn, *Derogations Under Human Rights Treaties*, in: *British Yearbook of International Law* (1976) 48 (1), p. 282, quoted in Lillich, Richard B., *Civil Rights*, in: Claude, Richard P./Weston, Burns H. (Eds.), *Human Rights in the World Community: Issues and Action*, 3rd ed., Philadelphia, University of Philadelphia Press, 2006, p. 94, footnote 7.

²⁹⁵ Lillich, Richard B., *Civil Rights*, in: Claude Richard P./Weston, Burns H., p. 94, footnote 6.

interpretation that goes even further. According to her, *jus cogens*, because of its nature, would be part of all laws.²⁹⁶

The relationship between States and their citizens concerning *jus cogens* is conclusively explained by *Criddle* and *Fox-Decent* as follows:

“The key to understanding international *jus cogens* lies in a much neglected passage of *The Doctrine of Right*, where Immanuel Kant discusses the innate right of humanity which all children may assert against their parents as citizens of the world. Drawing on Kant’s account of familial fiduciary relations, our theory of *jus cogens* posits that states exercise sovereign authority as fiduciaries of the people subject to state power. An immanent feature of this state-subject fiduciary relationship is that the state must comply with *jus cogens*.”²⁹⁷

Therefore, it can be argued that the fiduciary theory rethinks the concept of *jus cogens* in international legal theory and also case law. The interpretation of WTO legal experts and diplomats, as a result, should be that the cases brought to the WTO dispute settlement mechanism do not simply involve the interest of States but also implicitly the interests, the rights and the future of their peoples. Even though not all human rights are *jus cogens* and it can be concluded that the 1948 Universal Declaration of Human Rights is not a treaty and is not formally mandatory, States still have fiduciary obligations similar to those that accompany parenthood. This does not mean that all citizens should be treated like children or that States should only protect children but rather that governmental authorities, like parents, are subject to fiduciary obligations that cannot be denied – just as parents are not at liberty to reject the obligations that accompany parenthood. *Criddle* and *Fox-Decent* argue with reference to Art. 53 of the Vienna Convention on the Law of Treaties²⁹⁸ that:

²⁹⁶ Marceau, Gabrielle, *WTO Dispute Settlement and Human Rights*, in: *European Journal of International Law* (2002), Vol. 13, Nr. 4, p. 756.

²⁹⁷ Criddle, Evan J./Fox-Decent, Evan, *A Fiduciary Theory of Jus Cogens*, in: *The Yale Journal of International Law*, Vol. 34, 2009, pp. 332-333. The authors also quote Kant, Immanuel, *The Metaphysics of Morals* (translated by Mary Gregor), Cambridge (England), New York, Cambridge University Press, 1991, pp. 98-99.

²⁹⁸ “Article 53 – *Treaties conflicting with a peremptory norm of general international law* (“*jus cogens*”): A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general

“the whole of Article 53 of the VCLT is superfluous. States are bound by *jus cogens* whether they have ratified the VCLT or not and irrespective of whether Article 53 has the status of customary international law. Therefore, even states that have not ratified the VCLT are barred from concluding treaties that violate peremptory norms. Article 53 makes no difference to states’ obligation to refrain from entering treaties that violate *jus cogens*.”²⁹⁹

Let us now turn to conflicts between WTO law and *jus cogens*. According to Marceau, these conflicts are “conceptually possible”;³⁰⁰ human rights with the status of *jus cogens* have “hierarchical superiority over WTO provisions in cases of conflict”³⁰¹ and “the inconsistent WTO provision is automatically invalidated”.³⁰² She also explains that:

“because of its very nature, *jus cogens* would be part of all laws and thus would have direct effect in WTO law. The customary prohibition against any violation of *jus cogens* is such as to invalidate *ab initio* any violating provision, a legal reality that binds all states and all institutions. Situations of pure conflicts between WTO provisions and *jus cogens* are, however, difficult to conceive. In most, if not all, cases, the strong presumption against a violation of *jus cogens* will lead to an interpretation of WTO law which avoids such a violation. Some may argue that WTO panels and the Appellate Body do not have the capacity to determine the nullity of a WTO treaty provision for violation of *jus cogens*, as they only have the capacity to recommend that a national measure be brought into conformity with the covered agreements (although WTO provisions must be interpreted in taking

international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.”

²⁹⁹ Criddle, Evan J./Fox-Decent, Evan, p. 355.

³⁰⁰ Marceau, Gabrielle, *WTO Dispute Settlement and Human Rights*, in: *European Journal of International Law* (2002), Vol. 13, Nr. 4, p. 756.

³⁰¹ *Ibid.*, p. 798.

³⁰² *Ibid.*, p. 802.

into account relevant human rights law). In all cases, however, WTO Members in violation of human rights remain subject to rules on state responsibility and liable for the consequences of that violation. In short, there is no perfect coherence between the human rights and WTO systems of law and jurisdiction.”³⁰³

While only a few human rights are recognised as having *jus cogens* status,³⁰⁴ it is worth highlighting that new peremptory norms may emerge.³⁰⁵ As Ruiz-Fabri explains, the UN General Assembly and the International Court of Justice have a sort of ‘universal jurisdiction’ and both the structural and institutional capacities to make declarations concerning *jus cogens*³⁰⁶ – i.e., declarations on the interpretation of already recognised peremptory norms as well as new peremptory norms. After the ICJ repeatedly indirectly recognised *jus cogens* since the 1970s, it qualified *jus cogens* for the first time in 2006, in the case *Armed Activities*,³⁰⁷ a norm, namely the prohibition of genocide, as mandatory and thus expressly confirmed the existence of *jus cogens*.³⁰⁸ It is also important to stress that *jus cogens* generate *erga omnes* obligations.³⁰⁹

³⁰³ *Ibid.*, p. 756.

³⁰⁴ *Ibid.*, p. 798.

³⁰⁵ With reference to the emergence of new peremptory norms, Articles 64 and 66 of the Vienna Convention on the Law of Treaties deserve attention.

Article 64 – *Emergence of a new peremptory norm of general international law (“jus cogens”)*: If a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates.

Article 66 – *Procedures for judicial settlement, arbitration and conciliation*: If, under paragraph 3 of article 65, no solution has been reached within a period of twelve months following the date on which the objection was raised, the following procedures shall be followed:

(a) Any one of the parties to a dispute concerning the application or the interpretation of article 53 or 64 may, by a written application, submit it to the International Court of Justice for a decision unless the parties by common consent agree to submit the dispute to arbitration;

(b) Any one of the parties to a dispute concerning the application or the interpretation of any of the other articles in Part V of the present Convention may set in motion the procedure specified in the Annex to the Convention by submitting a request to that effect to the Secretary-General of the United Nations.

³⁰⁶ Ruiz-Fabri, Hélène, *Article 66 – Convention de 1969*, in: Corten, Olivier/Klein, Pierre (Eds.), *Les Conventions de Vienne sur le droit des traités: Commentaire article par article*, Vol. III, Brussels, Bruylant, 2006, p. 2391.

³⁰⁷ International Court of Justice, *Armed Activities* (New Application: 2002), ICJ Reports 2006, 6, marginal number 64.

³⁰⁸ Raffener, p. 52.

³⁰⁹ For details, see Gaja, Giorgio, *Obligations erga omnes, International Crimes and Jus Cogens: A tentative analysis of three related concepts*, in: Weiler, Joseph H. H. (Ed.), *International Crimes of State*, Berlin, De Gruyter, 1989, pp. 158-159.

At UN level, the Universal Declaration of Human Rights proclaims that everyone has the right to own property alone as well as in association with others.³¹⁰ So, considering that property is also an economic right and may be transferred with trade transactions, there is a link between human rights and trade – i.e., human rights and trade are not in opposition, yet their relation depends on checks and balances in order to build and maintain harmony. *Sachs* and *Santarius* record that “the bedrock of the United Nations is a commitment by member states to respect human rights”.³¹¹

Howse, who is in favour of interpreting WTO rules in conformity with the human rights obligations of WTO Member States,³¹² argues that several eminent WTO experts question whether any human rights are sufficiently well understood or clearly embodied in international law so as to be relevant to the operation of the WTO.³¹³ Also *Maduro*, while citing *Koskenniemi*,³¹⁴ explains that there is a “lack of a true international consensus on the number and content of human rights”.³¹⁵ *Maduro*’s argument, consequently, partly agrees with *Howse*’s regarding the clear understanding of human rights embodied in international law.

There is plenty of literature in favour of and against market freedom as a fundamental right at global level. At first glance, it can be implied that market freedom might be regarded as a fundamental right at global level and, as a consequence, also at the WTO. This view, however, would be strictly limited to a moral perspective. But, greater conceptual detail and a fuller examination may also allow one to understand market freedom as a fundamental right from a wider legal perspective. This

³¹⁰ Art. 17 (1) of the Universal Declaration of Human Rights.

³¹¹ Sachs, Wolfgang/Santarius, Tilman (Eds.), *Fair Future: Resource Conflicts, Security and Global Justice*, London, 2007, p. 202.

³¹² For details, see Howse, Robert/Teitel, Ruti G., *Beyond the divide: the International Covenant on Economic, Social and Political Rights and the World Trade Organization*, In: Joseph, Sarah/Kinley, David/Waincymer, Jeff (Eds.), *The World Trade Organization and Human Rights: interdisciplinary perspectives*, Cheltenham, Edward Elgar, 2009, p. 67.

³¹³ Howse, Robert, *Human Rights in the WTO: Whose Rights, What Humanity? Comment on Petersmann*, In: NYU School of Law, *Jean Monnet Working Paper*, Nr. 12/02, New York, 2002 to be found at <http://centers.law.nyu.edu/jeanmonnet/papers/02/021201-01.rtf> . Date of access: 12th September 2011.

³¹⁴ Koskenniemi, Martti, *The Future of Statehood*, In: *Harvard International Law Journal*, Nr. 32, 1991, p. 397.

³¹⁵ Maduro, Miguel Poiaras, *Legal Travels and the Risk of Legal Jet-Lag: The Judicial and Constitutional Challenges of Legal Globalization*, In: Monti, Mario et al. (Eds.), *Economic Law and Justice in Times of Globalization: Festschrift for Carl Baudenbacher*, Baden-Baden, 2007, p. 183.

understanding finds logic in *Dworkin*'s idea that "moral judgements are an integral part of the law."³¹⁶ As *Skubik* notes:

"In at least hard, and often in even easy and mid-range, cases judges must find and apply moral principles – principles which constitute a critical subset of those principles characteristically available to judges qua decision-makers – in order to justify decisions rendered."³¹⁷

As a result, it can be argued that interpreting market freedom as a global fundamental right is about interpreting peoples' liberty and equality, because 'equal people' must have 'equal freedoms' – i.e., the same human and fundamental rights. Moreover, as emphasised by *Kant* and *Rawls*, 'equal freedoms' should be interpreted broadly. In consequence, it can be argued that 'equal freedoms' include the capacity of being reasonably autonomous and, therefore, comprise freedom of contract and freedom to trade, which are essential for creating market freedom.

According to *Jhering*:

"the relation of law and morals is the Cape Horn of jurisprudence. The juristic navigator who would overcome its perils runs no little risk of fatal shipwreck."³¹⁸⁻³¹⁹

Law and morals also have historical connections. In the words of *Skubik*, there are "connections which are plainly demonstrable, both that the development of a society's law has been influenced by a society's morals, and that a society's morals have been influenced by that society's law."³²⁰ *Skubik* also cites that, with regard to this issue,

³¹⁶ Guest, Stephen, *Ronald Dworkin*, 2nd ed., Edinburgh, 1997, p. xiii.

³¹⁷ Skubik, Daniel W., *At the Intersection of Legality and Morality: Hartian Law as Natural Law*, New York, 1990, p. 5.

³¹⁸ Jhering, Rudolf von, *Geist des Römischen Rechts*, 1st ed., 1854, § 26, p. 48, quoted in Skubik, Daniel W., *At the Intersection of Legality and Morality: Hartian Law as Natural Law*, New York, 1990, p. vii.

³¹⁹ The quotation does not inform the year, page number and language (either German or a translation to English) of Jhering's book.

³²⁰ Skubik, p. 102.

there are “various contingent connections that are readily conceded by *Hart*”,³²¹ and also argues that both the former Nazi race laws in Germany and the former apartheid laws in South Africa were still plainly laws, although undeniably iniquitous.³²² Anti-polygamy statutes at the present time, on the other hand, prove very well how laws and morals can be intertwined.

Thus, laws cannot be interpreted in a morally neutral manner even if, according to legal positivists, there is no conceptual connection between law and morals.³²³ This understanding should also apply to laws governing trade and market freedom, and the relation of the latter with peoples’ welfare and human and fundamental rights. It is a question of human autonomy and a broader interpretation of the relation between market freedom, freedom of contract, law and morality.

The Brazilian Constitution, in its long Art. 37, establishes a relationship between public administration and morality that is worth citing here. This relationship is known in Brazil as the ‘morality principle’.

“Art. 37. The direct or indirect public administration of any of the powers of the Union, the States, the Federal District and the municipalities, as well as their foundations, shall obey the principles of lawfulness, impersonality, morality, publicity, efficiency and also the following:

I - public offices, positions and functions are accessible to all Brazilians who meet the requirements established by law, as well as to foreigners, under the conditions set forth by law;

II - investiture in a public office or position depends on previously passing an entrance examination consisting of tests or tests and

³²¹ Hart, Herbert L. A., *Positivism and the Separation of Law and Morals*, in: *Essays in Jurisprudence and Philosophy*, 1983, p. 54; Hart, Herbert L. A., *Law, Liberty and Morality*, 1963, p. 1-2; and Hart, Herbert L. A., *Concept of Law*, 1961, p. 199-200, all quoted in Skubik, p. 132.

³²² Skubik, p. 103.

³²³ According to the positivist view, law and morality should be kept separate and both the concept of law as well as the concept of the validity of the law must be defined separately from morality. For Robert Alexy, this view is wrong. According to him, there are necessary connections between law and morality, because, in order to define concepts of law and their validities, moral elements are needed, especially with regard to what is right and wrong in life. For details, see Alexy, Robert, *The Argument from Injustice: a Reply to Legal Positivism* (translated by Bonnie Litschewski Paulson and Stanley L. Paulson), Oxford, Clarendon Press, 2002.

presentation of academic and professional credentials, in accordance to the nature and complexity of the office or position, as set forth by law, except for appointment to a commission office declared by law as being of free appointment and discharge;

III - the period of validity of a public entrance examination shall be up to two years, extendable once, for a like period of time;

IV - during the unextendable period established in the public call notice, a person who has passed a public entrance examination of tests, or of tests and presentation of academic and professional credentials, shall be called with priority over newly approved applicants, to take an office or position in the career;

V - trusting functions, to be exercised exclusively by civil servants taking effective offices, and the commission offices, to be held by civil servants of the career in the cases, under the conditions and observing minimum percentages set forth by law, shall be destined only to attributions of direction, management and assistance;

VI - the right to free union association is guaranteed to civil servants;

VII - the right to strike shall be exercised in the manner and within the limits defined by a specific law;

VIII - the law shall reserve a percentage of public offices and positions for handicapped persons and shall define the criteria for their admittance;

IX - the law shall establish the cases of hiring for a limited period of time to meet a temporary need of exceptional public interest;

X - the remuneration of the civil servants and the subsidies mentioned by paragraph 4 of article 39 shall be determined or altered by specific law, with due regards to the private enterprise in each case, it being assured annual general revision, always on the same date and without distinction of indices;

XI - the remuneration and the subsidies of the holders of public offices, functions and positions in the direct administration, autarchies and foundations, of members of all Powers of the Union, States, Federal District and municipalities, of the holders of elective office and of the other political agents as well as the salaries, pensions and any other

kind of financial compensation, whether received cumulatively or not, shall not exceed the monthly subsidies, in legal tender, of the Justices of the Supreme Federal Court, it being the limit, in the case of municipalities, the subsidies of the Mayor, and in the case of the States, the subsidies of the Governor in the scope of the Executive Power, the subside of State and District Deputies in the scope of the Legislative Power and the subside of the Justices of the Justice Courts, limited to ninety percent plus twenty five hundredths of the monthly subsidies, in legal tender, of the Justices of the Supreme Federal Court, in the scope of the Judiciary Power, this limit being also applicable to the case of the members of Public Prosecution, State Attorneys and State Defenders;

XII - the salaries for offices of the Legislative and Judicial Powers may not be higher than those paid by the Executive Power;

XIII - the linkage or equalization of salaries, for purposes of the remuneration of the personnel in the public services, is forbidden;

XIV - the pecuniary raises received by a civil servant shall not be computed or accumulated for purposes of granting subsequent raises;

XV - the subsidies and salaries of holders of public offices and public positions may not be reduced, except when necessary to comply with the provisions of clauses XI and XIV of this article and of the articles 39, paragraph 4, 150, II, 153, III and 153, paragraph 2, I;

XVI - remunerated accumulation of public offices is forbidden, except in the cases below, provided there is compatibility of working hours, and with observance of clause XI of this article:

- a) of two teaching offices;
- b) of one teaching office with another technical or scientific office;
- c) of two offices or positions exclusive of health professionals, with regulated professions;

XVII - the prohibition to accumulate extends to positions and functions and includes autarchies, foundations, public companies, mixed capital companies, their affiliates, and societies controlled, directly or indirectly, by the Government;

XVIII - the financial administration and its revenue officers shall, within their spheres of authority and jurisdiction, have the right to precedence over the other administrative sectors, as the law provides;

XIX - only by means of a specific law shall an autarchy be created and shall a public company, a mixed capital company and a foundation have their creation authorized, it being necessary, in the latter case, a complementary law to define the scope of action;

XX - the creation of subsidiaries of the entities mentioned in the preceding clause depends on legislative authorization, in each case, as well as the participation by any of them in a private company;

XXI - with the exception of the cases specified in law, public works, services, purchases and disposals shall be contracted by public bidding proceedings that ensure equal conditions to all bidders, with clauses that establish payment obligations, maintaining the effective conditions of the bid, as the law provides, which shall only allow the requirements of technical and economic qualifications indispensable to guarantee the fulfilling of the obligations;

XXII - the tax administrations of the Union, States, Federal District and municipalities, activities essential to the functioning of the State, exercised by officers in specific careers, shall have priority resources for the execution of their activities and shall have integrated actions, including the sharing of databases and tax information, as provided by law or by convene.

§ 1 - The publicity of the acts, programmes, public works, services and campaigns of Government bodies shall be of educational, informative or social orientation character, and shall not contain names, symbols or images that characterize personal propaganda of Government authorities or employees.

§ 2 - Non-compliance with the provisions of items II and III shall result in the nullity of the act and punishment of the responsible authority, as the law provides.

§ 3 - Complaints relating to the rendering of public services shall be regulated by law.

§ 4 - Acts of administrative dishonesty shall result in the suspension of political rights, loss of public function, prohibition to transfer personal property and reimbursement to the Public Treasury, in the manner and grading established by law, without prejudice to the applicable criminal action.

§ 5 - The law shall establish the limitations for illicit acts, performed by any agent, whether or not a Government employee, which cause losses to the Public Treasury, without prejudice to the respective claims for reimbursement.

§ 6 - Public legal entities and private legal entities rendering public services shall be liable for damages that any of their agents, acting as such, cause to third parties, ensuring the right of recourse against the liable agent in cases of malice or fault.

§ 7 - The law shall provide for the conditions and restriction imposed to the civil servant or public employee with access to classified information.

§ 8 - The management, budgetary and financial autonomy of bodies and entities of direct and indirect administration may be extended by means of a contract, to be firmed between their administrators and the Public Power, with the purpose of establishing performance goals for the body or entity, it being incumbent to the law to provide for:

I - the term of the contract;

II - the controls and criteria for evaluation of the performance, rights, duties and accountabilities of the managers;

III - the remuneration of the personnel.

§ 9 - The provisions of Clause XI shall apply to public companies and mixed capital corporations, and their affiliates, which receive remittances from the Union, States, Federal District or municipalities for payment of personnel or general current expenses.

§ 10 - The simultaneous perception of retiring compensations derived from article 40 or articles 42 and 142 with the remuneration of the public office, employment or position is prohibited, excepted the cases of accumulation provided for by this Constitution, the elective offices

and the commission offices declared in law as of free appointment and dismissal.

§ 11 - The monies of indemnificatory nature shall not be considered into the remuneratory limits subject of clause XI of this article.

§ 12 - For the purposes of the provisions of clause XI of this article, the States and Federal District shall be allowed to fix, within their jurisdiction, by means of amendments to the respective Constitutions and Organic Law, as sole limit, the monthly subsidies of the Justices of the respective State Court, limited to ninety percentage points plus twenty-five hundredths of percentage points of the monthly subsidies of the Justices of the Supreme Federal Court, this paragraph not being applicable to the subsidies of State Deputies, District Deputies and councilmen.”

In consequence, morality of administration and legality of administration become connected. According to *Grau*,³²⁴ the content of morality of administration and legality of administration is to be found within the law itself. He argues that this ‘principle’ requires serious, loyal, motivated and enlightening conducts even if they are not required by law, but rather must arise from the interpretation of the law and its entire system. *Grau*³²⁵ also argues that good faith and the principle of morality must be considered as requirements of public administration. He cites on this matter *Karl Larenz*,³²⁶ for whom a society in which every person considers everyone else suspicious resembles a latent war between everybody and, instead of peace, there is a dominance of discord in the society, because human communication becomes disturbed at its deepest level where there is no trust. I disagree with *Grau*, however, when he defends that the ethics of the legal system is the ethics of the legality that is imposed by the national constitution and the infra-constitutional legislation, which cannot be surpassed otherwise their system is going to become dissolute.³²⁷ I believe that this view is limited to the national constitutional State, for the reason that it defines that the legality imposed by the national constitution and infra-constitutional

³²⁴ *Grau*, p. 286.

³²⁵ *Ibid.*

³²⁶ Larenz, Karl, *Derecho Civil – Parte General* (translated by Miguel Izquierdo and Marcías-Picavea), Madrid, Editorial Revista de Derecho Privado, 1978, p. 59, quoted in *Grau*, p. 286.

³²⁷ *Grau*, p. 287.

legislation cannot be transcended. I consider this point of view inappropriate for the present times, contrary to the problems and challenges of the international community, against the interdependence of countries, against the ‘cooperative constitutional State’ model,³²⁸ against the principles of justice and, of course, against a global constitutionalism. National law, including national constitutional law, is not sufficient to solve current problems. As I have already mentioned, constitutional States must have a ‘constitutional openness’³²⁹ to international law and, as a consequence, be a result of cooperativism among peoples. Furthermore, a constitutional openness with due respect for human rights does not seem to be either immoral or unethical.

3.2. Globalisation of Trade

Globalisation changed the previous existing world order and created interdependence among countries. Conflicts of international and supranational order, in turn, increased due to the economic globalisation, the dissemination of information by telecommunications, and the flexibility of legal rules in time and space. These interconnect in chains or networks to serve the transnational legal fields that were created by a network of formal and informal agreements involving banks, enterprises, production and supply chains, marketing and distribution.³³⁰ As a consequence, new challenges for access to justice have been created with globalisation, and this section of the thesis examines their relationship.

Many academics and professionals, especially economists and political scientists, have paid attention for a century to international economic integration and its benefits and costs. *Jaeger Junior*³³¹ argues that economic integration is the method through

³²⁸ A cooperative constitutional State is the Nation State that finds its identity also in international law, in the intertwining of international and supranational relations, in the perception of international cooperation and international responsibility as well as in the field of solidarity (Häberle, 2007, p. 4). For more details, see the section of this thesis named ‘Constitutionalism’.

³²⁹ For details, see Häberle, Peter, *Estado constitucional cooperativo* (translated by Marco Augusto Maliska and Elises Antoniuk), Rio de Janeiro, 2007, p. 1 f.

³³⁰ For more details, see Faria, José Eduardo, *O Direito na Economia Globalizada*, 2nd ed., São Paulo, Malheiros, 1999, p. 156 quoted in Hess, p. 38.

³³¹ Jaeger Junior, Augusto, *Temas de Direito de Integração e Comunitário*, São Paulo, Editora LTr, 2002, p. 38.

which modern States are trying to solve the basic issue of providing citizens of a global community with certain minimum rights – which have to be understood as economic and social rights – that enable them four freedoms – to be precise, freedom of (1) goods, (2) services, (3) persons and (4) capital – as well as integration. But it is still controversial if the world benefits from the development of a free global market.

Globalisation is different from the trade developments that took place within the last two centuries. Firstly, it is not limited to trade, but means trade plus all factors of production. Secondly, it has helped not only the growth of companies, but more international trade, new technologies, transportation improvements, fast exchange of information, lower prices for goods and services, the increase of foreign direct investment, international transactions involving services and factors of production, integration of capital markets and new international organisations and institutions to coordinate these activities. Thirdly, national public policies have also changed in order to make domestic economies and internal markets more competitive at the international level. Moreover, several non-governmental organisations (NGOs) dedicated to issues of the interest of many countries have been created. Therefore, globalisation generates several effects, including legal ones.

Concerning the international organisations and institutions created to work with trade and international economic relations, it can be said that they expanded and acquired worldwide importance. Some examples are the WTO, the International Monetary Fund (IMF), the World Bank and the World Economic Forum, which influence and generate effects for all countries in the world.

*Figueiredo*³³² recalls that historical experience teaches that the higher the volume of goods put into circulation, the higher the number of people who may have access to them. And he argues that legal orders should be synchronised with public policies that promote and encourage free enterprise, free trade and freedom of competition, because any restrictive measure that may result in curtailment of the free movement

³³² Figueiredo, p. 38.

of wealth represents an undesirable obstacle for individuals to have access to goods that are necessary for both their personal needs and pleasures.³³³

In terms of benefits, globalisation is especially good for consumers. They have access to a greater variety of goods and services, can take advantage of increased competition, and benefit from the resulting lower prices. Even though the rich portion of the society of a specific country may enjoy a larger share of the gains, the majority of consumers are likely to have gains. The losers may be those whose incomes fall disproportionately due to direct competition from imports. In other words, average citizens are very likely to increase their material standard of living.³³⁴ *Deardorff* and *Stern* argue that “with only a few exceptions – which economists generally view as unlikely to reverse the broad conclusion in practice – it applies to all countries comparing trade to not trading at all.”³³⁵ According to the same authors, the Stolper-Samuelson Theorem:

“identifies winners and losers from trade in terms of the national abundance and scarcity of factors of production, such as labor and capital, from which they derive their incomes. Owners of abundant factors tend to gain more than average from trade, while owners of scarce factors are made unambiguously worse off.”³³⁶

One may understand, as a result, that there are winners and losers in the globalisation process. With regard to the losers, *Freeman*³³⁷ argues that empirical studies confirm that increased trade accounts for a portion (although much less than half) of the increased inequality observed in the United States since 1980 – i.e., according to the author, there has been an increasing income inequality. Nevertheless, both theory and

³³³ Figueiredo, p. 38.

³³⁴ Deardorff, Alan V./Stern, Robert M., *What the Public Should Know about Globalization and the World Trade Organization*, In: Stern, Robert M. (Ed.), *Globalization and International Trade Policies*, Singapore and Hackensack, NJ, World Scientific Pub Co. Inc., 2009, p. 27.

³³⁵ Ibid, p. 27.

³³⁶ Ibid, p. 27. The citation made by authors *Deardorff* and *Stern* and reproduced above refers to Stolper, Wolfgang/Samuelson, Paul A., *Protection and Real Wages*, In: *The Review of Economic Studies*, Vol. 9, Nr. 1, Oxford, 1941, p. 58-73. *Deardorff* and *Stern*, however, did not mention the specific page number where it can be found.

³³⁷ Freeman, Richard B., *Are your wages set in Beijing?*, In: *The Journal of Economic Perspectives*, Vol. 9, Nr. 3, Pittsburgh, 1995, *no page number informed*, quoted in Deardorff, Alan V./Stern, Robert M., p. 28.

experience prove that winners gain more than losers lose.³³⁸ In other words, it is a matter of balance that depends on national governments, as the development of countries was and continues to be directly linked to trade development. If one takes the BRIC countries (Brazil, Russia, India and China) into consideration, this becomes even clearer. The four of them have started to develop their economies tremendously and have generated social developments when their governments changed their policies and laws toward trade, taxes, foreign investment rules, market access and competition, i.e. making them more stable, rational, reliable and competitive. Let us take Russia as an example. During the communist regime and the minimised trade of that period, it failed to grow. The case of Brazil was not as tragic as that of Russia, as it never had a communist regime, but can be used as an example. As long as there was import-substituting industrialisation, economic protectionism and State interventionism towards a basic opening for foreign trade practices, Brazil's growth was very slow and inflation was very high. As a result, empirical evidence shows that globalisation and trade are good for economic growth, social improvements, and progress.

However, while in some countries companies expand, in others they reduce and some even close. This means, among other things, that the people linked to these companies may become winners or losers of globalisation. *Deardorff* and *Stern* emphasise that people “gain or lose along with their industries, and some can find the basis for their livelihoods destroyed, a serious cost that public policy can usually only partially acknowledge.”³³⁹ In the short run, recovery will depend on the circumstances of every particular situation. “In the longer run, people relocate, retrain, and otherwise readjust to changing circumstances.”³⁴⁰ So, the argument of the same authors regarding who the winners and losers of globalisation will be in the long run is “they will be subsequent generations, not ourselves”.³⁴¹

Concerning the expansion, reduction and closing of companies because of globalisation, it is appropriate to emphasise that the ability to shift management strategies to what makes economic sense, adapt to new technologies, know and

³³⁸ Deardorff/Stern, p. 28.

³³⁹ *Ibid.*, p. 29.

³⁴⁰ *Ibid.*, p. 30.

³⁴¹ *Ibid.*, p. 30.

deliver the goods and services that markets want, make profits and remain competitive are the key elements of a company to continue working and being successful. In fact, well-managed small companies may even expand because of globalisation rather than close – as many people tend to assume.

Nonetheless, globalisation has also created new risks. Among them are financial speculation and the domino effect that can be generated by an ‘illness’ in the financial market or national economy of a key country, like the United States or Japan, for example. This has the potential of creating an international recession that can affect billions of people worldwide. The so-called ‘late-2000s financial crisis’³⁴² was an ‘illness’ that surfaced in the United States, our ‘big brother’ in the world community.

Trade and globalisation have also changed the cultures and way of life of many countries. Certain brands and styles of clothes, shoes, household appliances, computers, softwares, cars, movies, TV channels, music, cuisines, pharmaceuticals, etc. have spread throughout the world due to trade and globalisation. This has had both positive and negative effects. Among the positive ones, companies have expanded, generated more jobs worldwide, high quality products are delivered cheaper due to higher competition and less production costs, and people have the possibility of living better and knowing more about the rest of the world. As for the bad effects, national cultures and traditions, which are public goods, are being transformed by the adoption of manners from other countries, especially from the United States. This even has the potential of creating conflicts among cultures – a risk that should not be disregarded. In the end, national cultures and traditions belong to intangible cultural heritage, which should be protected by every signatory State Party to the Convention for the Safeguarding of the Intangible Cultural Heritage.³⁴³ The convention was adopted by the United Nations Educational, Scientific and Cultural Organization (UNESCO) on 17th October 2003 and has been in force since 20th April 2006 for the 30 States that ratified it on or before 20th January 2006. In the meantime,

³⁴² Also called ‘Great Recession’, it started in the United States in December 2007 and affected the entire world economy.

³⁴³ According to Art. 11 (a) of the convention, each State Party shall take the necessary measures to ensure the safeguarding of the intangible cultural heritage present in its territory.

more than 130 countries have ratified the convention.³⁴⁴⁻³⁴⁵ I have mentioned this convention because it is an example of a global response of Nation States to some of the risks that the globalisation process – including the globalisation of trade and economic interdependence deriving from it – may represent over specific public goods, e.g. societal values such as culture.³⁴⁶ This UNESCO convention and the ratification of it by more than 130 countries show that national governments are protecting national cultures and traditions. It can be argued, as a result, that the legislative and executive powers of these countries are interested in enforcing the Convention for the Safeguarding of the Intangible Cultural Heritage and, as a consequence, providing access to justice in the legal fields related to it. Such conduct vis-à-vis international economic law issues, however, does not exist, even though the preamble of the 1948 Universal Declaration of Human Rights states that:

“Now, therefore the General Assembly proclaims this Universal Declaration of Human Rights as a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction.”³⁴⁷

It can be implied, as a consequence, that countries are not coherently balancing globalisation of trade and the human right of access to justice. There is manifestly a problem concerning the respect and enforcement of international rule of law in issues that involve international trade, international economic relations and peoples’ individual rights, including human rights. This is because the relation between trade protection and public goods protection continues to be power-oriented, to be precise,

³⁴⁴ According to Art. 34 of the convention, it shall enter into force with respect to any other State three months after the deposit by that State of its instrument of ratification, acceptance, approval or accession.

³⁴⁵ For the full list of Member States and access to up-to-date information, visit www.unesco.org/culture/ich/index.php?lg=en&pg=00024.

³⁴⁶ Culture is foreseen in Articles 22 and 27 of the Universal Declaration of Human Rights.

³⁴⁷ Paragraph 8 of the preamble of the Universal Declaration of Human Rights of 1948.

oriented by certain economic superpowers like China and the United States, for example. While it is true that there is international economic law to take care of these problems, one also has to admit that the current system of international economic law does not protect international public goods. The only exception is EU law. Nevertheless, EU law is more than merely international economic law, as it developed into other legal fields, but, more importantly, did this in conformity with the principles of justice and human rights obligations of the EEC, EC and EU Member States.

The future of globalisation is uncertain and one should not reject the possibility that natural, financial and political actions (e.g., earthquakes, depressions and wars, respectively) may change its course or even reverse the globalisation process. As *Deardorff* and *Stern* argue:

“the institutions of the global economy – the World Bank, IMF, and WTO – would be incapacitated if the United States or Europe withdrew support, and considering recent controversies, this could happen. Without them, especially the WTO, the world could descend into a trade war or a series of competitive devaluations and tariff increases, just as in the 1930s.”³⁴⁸

Specifically with reference to wars, I believe that the future scenario looks less worrying. This is because it is conceivable that the present level of globalisation and cooperation, the institutions that were created, and the current structure of the world economy make wars less likely to occur. And, if they still occur, they will certainly not have the proportions of either World War I or World War II, otherwise the entire world would go bankrupt. I think that the leading politicians and policy-makers at national, international and supranational levels know that.

³⁴⁸ Deardorff/Stern, p. 28.

According to *Gordon Brown*,³⁴⁹ there is no consensus on how we should develop the future and this should make us rethink issues like protectionism and cooperation.

3.3. Trade Law and Access to Justice

Law is essential for economic integration. This is because an economic integration cannot be consolidated without a common legal system able to assure both its existence and continuity as well as a uniform interpretation and application of the law.³⁵⁰ On the other hand, contemporary trade law is experiencing linkage problems. While the linkage of trade and labour standards is not new, *Garcia*³⁵¹ points out that in the last few years the literature devoted to trade linkages has mushroomed. Besides labour, linkage fields include competition law, intellectual property, investment, development, the environment, culture and human rights. According to the same author, links to competition law, the environment, and human rights continue to be resisted³⁵² and the main explanation for that is to avoid creating more opportunities for domestic protectionism. According to *Alston*:

“the relationship between human rights and trade is one of the central issues confronting international lawyers at the beginning of the twenty-first century and any proposal which purports to marry, almost symbiotically, the two concerns warrants careful consideration.”³⁵³

³⁴⁹ The former Prime Minister of the United Kingdom gave a speech called ‘The Insecurity Index’ on 16th November 2010 at the New York University La Pietra Policy Dialogues, in Florence, Italy. The information above is based on my personal notes.

³⁵⁰ Casella, Paulo Borba, *Mercosul: Exigências e Perspectivas – Integração e Consolidação do Espaço Econômico (1995-2001-2006)*, São Paulo, 1996, p. 230 f.

³⁵¹ Garcia, pp. 2-3.

³⁵² Waller, Spencer W., *The Internationalization of Antitrust Enforcement*, In: Boston University Law Review, Vol. 77, 1997, p. 344-345; Charnovitz, Steve, *The World Trade Organization and Social Issues*, In: Journal of World Trade, Vol. 28, 1994, p. 17, 24; Appleton, Arthur E., *Telecommunications Trade: Reach Out and Touch Someone?*, In: University of Pennsylvania Journal of International Economic Law, Vol. 19, 1998, p. 209, 211; Fox, Eleanor M., *Toward World Antitrust and Market Access*, In: The American Journal of International Law, Vol. 91, Nr. 1, 1997, p. 10-12; Smith, James F., *NAFTA and Human Rights: A Necessary Linkage*, In: University of California Davis Law Review, Vol. 27, Nr. 4, 1994, p. 806-817, all quoted in Garcia, p. 4.

³⁵³ Alston, Philip, *Resisting the Merger and Acquisition of Human Rights by Trade Law: a reply to Petersmann*, in: EJIL (2002) Vol. 13 Nro. 4, pp. 815-844, pág. 818, which can be found at <http://www.ejil.org/pdfs/13/4/1562.pdf>

In any case, trade linkages create legal debates that are responsible for highlighting the role of justice in international trade law and economic relations. In fact, the disagreements demonstrate that there is no consensus about what the right order should be. This should make us think about the world without the WTO. It would almost certainly become a trade war full of national protectionisms, tariff increases and dumpings. Scenarios like these have already happened in the past and would easily happen again without the existence of the present rules and institutions that regulate international trade.

Bacchus, who was the Chairman of the Appellate Body of the WTO from 1996 to 2003, summarises very well the role of trade in the world. In his words:

“(t)rade is vital to the world. And, further, the work of trade and the law of trade increasingly intersect with much else that is also vital to the world. Health, environment, labor rights, human rights, and much, much more are *all* related to trade. They all affect trade, and are all affected by trade.”³⁵⁴

In practical terms, Art. XX GATT plays an important role for access to justice, as it deals with measures concerning, *inter alia*, the protection of human health and human, animal and plant life; public morals; national security; and non-discrimination.³⁵⁵ So, Art. XX GATT is intimately linked to rule of law and constitutionalism.

For *Petersmann*, “as in regional forms of integration, trade law is conceived as the engine of global integration and its emerging constitutionalism”.³⁵⁶ And *Maduro* adds that “the way to promote global constitutionalism is by extending the scope and

³⁵⁴ Bacchus, James, *Groping Toward Grotius: The WTO and the International Rule of Law*, Address at the Harvard Law School on 1st October 2002, p. 7, which can be found at <http://www.worldtradelaw.net/articles/bacchusgrotius.pdf>. Date of access: 5th December 2013.

³⁵⁵ For the complete list, please read Art. XX GATT.

³⁵⁶ Petersmann, Ernst-Ulrich, *How to Reform the UN System? Constitutionalism, International Law and International Organizations*, In: *Leiden Journal of International Law*, Vol. 10, 1997, p. 445, quoted in Maduro, Miguel Poiras, *Legal Travels and the Risk of Legal Jet-Lag: The Judicial and Constitutional Challenges of Legal Globalisation*, In: Monti, Mario et. al. (Eds.), *Economic Law and Justice in Times of Globalisation: Festschrift for Carl Baudenbacher*, Baden-Baden, 2007, p. 179.

application of international trade law, human rights documents and dispute-settlement mechanisms.”³⁵⁷

Garcia has an interesting opinion about the dispute settlement mechanism of the WTO. For him, the WTO is an institution “for the interstate application of corrective justice principles to such situations in which the propriety of gain by a state or its enterprises is in question.”³⁵⁸ According to the same author, policymakers should also better evaluate the structure and effects of international trade law due to the problem of inequality between developed and developing countries. As a result, he believes that

“the principle of special and differential treatment (...) could in fact play a central role in satisfying the moral obligations that wealthier states owe poorer states as a matter of distributive justice. (...) Reforming special and differential treatment would be more than merely a political accommodation: it would significantly improve the justice of the trading system.”³⁵⁹

Concerning the relation between international trade law and human rights, for *Charnovitz*,³⁶⁰ they are not in opposition. In my opinion, although they do not need to be in opposition, they frequently are. That is why checks and balances and global constitutionalism – i.e., constitutionalism based on individual rights, non-discrimination and dispute settlement mechanisms – are so important for good relations between international trade law and human rights, especially access to justice. Rather than a global constitution, global constitutionalism requires a framework to manage constitutional challenges at the global level.

As a result, trade does also make a great contribution to peace, because the development of international trade law is a positive ‘social’ interaction based on structures of norms that have already been discussed by *Grotius*, *Hobbes* and

³⁵⁷ Maduro, Miguel Poiars, *Legal Travels and the Risk of Legal Jet-Lag: The Judicial and Constitutional Challenges of Legal Globalisation*, In: Monti, Mario et. al. (Eds.), p. 179.

³⁵⁸ Garcia, p. 52.

³⁵⁹ Garcia, p. 40.

³⁶⁰ Charnovitz, Steve, *The Globalization of Economic Human Rights*, In: *Brooklyn Journal of International Law*, Vol. 25, 1999, p. 113.

Pufendorf, who might be considered as the founders of the Westphalian system of ‘international law among states’.³⁶¹⁻³⁶² Furthermore, democracy with respect for rule of law, legal certainty and independent and impartial judges, among other prerequisites, create the best environment for economic development, as almost nobody is going to invest in countries and regions where there is corruption and no rule of law at all.

4. Multilevel Judicial Protection of Access to Justice in Trade Regulation?

Besides courts and court like bodies at the national level, the world has today several judicial bodies in charge of trade regulation that work at regional, international, and supranational levels, which work with national, international and supranational trade rules. There is, in consequence, a multilevel framework for trade litigations. This framework led to different degrees of integration, including judicial integration. The term ‘judicial integration’ might be understood as a product of some extent of common legal and judicial understanding on certain matters among countries with certain goals in common. The best example of judicial integration in the world is the European Union, where its powerful and independent court of justice (CJEU) developed the doctrines of supremacy and direct effect of EU law, and nowadays there is not only a high level of overall coherence between national and EU courts but also a high level of coherence in substantive law covering several legal fields (i.e., not just economic law) that led to a transnational rule of law. Mostly benefited by this integration process are citizens. Outside the EU, there are other examples, although with very different levels of judicial and substantive law integration. There is, for instance, the Association of South East Asian Nations (ASEAN), which was established on 8th August 1967; the Southern African Development Coordination Conference (SADCC), which was created on 1st April 1980 and improved on 17th August 1992 to the Southern African Development Community (SADC); the Common Market of the South (MERCOSUR), which was established on 26th March 1991; and the North American Free Trade Agreement (NAFTA), which was created

³⁶¹ Petersmann, Ernst-Ulrich, *International Economic Law, ‘Public Reason’, and Multilevel Governance of Interdependent Public Goods*, Manuscript, 2011, p. 9.

³⁶² For a description of the ‘Westphalian system’, see Hobe, Stephan, *The Era of Globalisation as a Challenge to International Law*, in: *Duquesne Law Review*, Vol. 40, 2001-2002, pp. 655-666.

on 1st January 1994. Thus, both American blocs mentioned – i.e., MERCOSUR and NAFTA – may be seen as ‘late-comers’ among the multilevel trading systems, since both were only born in the 1990s. The WTO, nevertheless, was established even later, on 1st January 1995 – that is to say, almost 50 years after the establishment of the General Agreement on Tariffs and Trade (GATT), which is also known simply as ‘GATT 1947’.

The focus of this section of the thesis is judicial integration rather than both judicial and substantive law integration. This is because other sections of the thesis – i.e., the sections ‘The MERCOSUR and the WTO’ in Chapter IV and ‘Brazil and the WTO’ in Chapter V – provide detailed investigations of the relationships between MERCOSUR and WTO laws and Brazilian and WTO laws, besides judicial and jurisdictional aspects.

Judicial integration is a process that requires effective norms and a dispute settlement mechanism for a certain group of countries in a specific region (i.e., for a project of regional judicial integration like the MERCOSUR) or for a group of countries from several regions of the world (i.e., for a project of global judicial integration like the WTO). In addition, the dispute settlement mechanism must be active and develop consistent case law, for the reason that the consistency of the decisions will generate their own legitimacies, expand the application scope of existing norms and create new norms through jurisprudence. On the other hand, in order to make a judicial integration successful, the implementation of norms and rulings at the national level must be performed and generate real effect.

With specific regard to trade, the world is currently experiencing a ‘market functionalism’ which is progressively weakening the constitutional controls of capitalism due to the fragility of the Bretton Woods system. This is what *Julios-Campuzano*³⁶³ argues. According to him, this weakening is taking place although courts, international organisations and agencies were created to organise economic

³⁶³ Julios-Campuzano, p. 83.

activities in both national and international markets.³⁶⁴ This is because the legal systems of Nation States have not reacted as quickly as the development of the transnational economic power of large companies which are capable of dynamically managing the production and distribution of different products in the global market and continuously adapt themselves to commercial demands. Moreover, Nation States are unable to individually regulate markets outside their respective territories. This brings me back to what I have argued in chapter one about the interdependence and interpenetration between national and international legal systems. Interdependence and interpenetration should support the highest constitutional values – e.g., human rights and fundamental rights – to be mutually respected by all legal and natural persons who also depend on them. Economic progress should not endanger human rights, nature and peace among peoples.

Concerning GATT and the WTO, *McHugh* argues that:

“the General Agreement on Tariffs and Trade (...) seeks to establish an overriding economic system for the global community, based upon fundamental ideological values that describe the marketplace upon a transnational basis. It is not, of course, an international constitution, but the relationship between the GATT and the world community has assumed some of those properties, and many people, throughout the world, respond to it in a similar way.”³⁶⁵

While it is true that on the one hand States reduce their capacity to plan their future, on the other hand this does not mean that the market is going to substitute democracy. Instead, I believe that Nation States must solve mutual problems together, be more cooperative with each other and always defend an integrative development and what *Häberle* calls a ‘common law of cooperation’³⁶⁶ for an ‘open society’.

³⁶⁴ Some examples are the World Bank, the International Monetary Fund (IMF), the Organization for Economic Cooperation and Development (OECD) and the World Trade Organization (WTO), besides informal groups and fora like the G6, G7, G8 and G20.

³⁶⁵ *McHugh*, James T., *Comparative Constitutional Traditions*, in: *Schultz*, David A. (Ed.), *Teaching Texts in Law and Politics*, Vol. 27, New York, 2002, p. 216 f.

³⁶⁶ Peter Häberle uses the expression in Spanish ‘*derecho común de cooperación*’ in his book *Pluralismo y Constitución: Estudios de Teoría Constitucional de la Sociedad Abierta*, Madrid, 2002, p. 263.

Problems concerning rule of law, however, may arise. This is because the scope of application of the rule of law principle in every legal tradition and its evolution should also be historically understood.³⁶⁷ Thus, even if it is possible to derive a common conception of the rule of law from different constitutional traditions, it will keep being possible to interpret and implement this principle in different ways. *Petersmann*³⁶⁸ mentions the historical experience that ‘rule by men’ and their ‘rule by law’ may be considered unjust. This is the case in relations between the national courts of two different instances (e.g., courts of appeals and first-instance courts) and also between a national and an international court or court-like organ. The first example is less complicated than the second, as a national first-instance court and a court of appeals are subject to the same (rule of) law and part of the same national legal system. This is not the case concerning a national and an international court or court-like organ. So, dialogues may develop real rule of law out of the ‘rule by law’, namely by responding to requests to adapt past interpretations of rules to new conceptions of democratic governance, human rights and ‘principles of justice’.³⁶⁹

Economides and *Weiler* explain that:

“movement into new substantive areas will no doubt give rise to a new set of substantive rights and these would, in turn, inevitably increase pressure for procedural developments within institutional frameworks.”³⁷⁰

In principle, there are different national rules of law and they are justified due to their different legal systems, governments, parliaments or congresses and constitutional traditions. Nevertheless, no one of these rules of law is capable of protecting global

³⁶⁷ An example is the *Rechtsstaat* concept of the 1949 German Constitution, which has to be understood in connection with the past and in particular with the Nazi period in Germany.

³⁶⁸ Petersmann, Ernst-Ulrich, *Administration of Justice in the World Trade Organization: Did the WTO Appellate Body Commit ‘Grave Injustice’?*, in: EUI Working Papers, *Multilevel Judicial Governance Between Global and Regional Economic Integration Systems: Institutional and Substantive Aspects*, Florence, European University Institute, 2009, p. 53.

³⁶⁹ *Ibid.*

³⁷⁰ Economides, Kim/Weiler, Joseph H.H., *Accession of the Communities to the European Convention on Human Rights: Commission Memorandum*, in: *The Modern Law Review*, Vol. 42, Issue 6, 1979, pp. 683-695 at p. 695.

public goods alone. How can this situation be solved? The most appropriate way seems to be through consistent interpretation based on common human rights and basic freedoms, and the development of an international rule of law. Courts and judges at national, regional and global levels rather than the legislative and executive branches of national governments are likely to be the most important actors in this move towards a more effective protection of private parties rather than political interests among countries. With specific regard to countries and their interests, *Witte* is eloquent: “a specific right, to which a state has closed the ‘front door’ by refusing to ratify the treaty wherein it figures, could enter through the ‘back door’ of custom or general principles.”³⁷¹ One could argue in the same way with regard to the MERCOSUR and the WTO and their dispute settlement mechanisms, namely that, if the MERCOSUR and the WTO have closed their ‘front doors’, rights may enter through the interpretation of their respective arbitrators, who could serve as a sort of ‘back door’. Judges and arbitrators must explore their creative ability with due attention to human rights and basic freedoms when they apply the law.

5. Chapter Conclusion

Trade governance and human rights have been under discussion for decades and the number of authors continues to increase. The topic involves legal, economic and political aspects. These have generated debates that have provided and continue to provide controversial conclusions. Still, there is no disagreement that States must protect the human rights of their citizens.

Just as every individual has self-interests, so every State also has self-interests. As a consequence, one of the problems related to multilevel judicial protection of access to justice in trade regulation is precisely that States tend to “view their duties as one-way: to their own people.”³⁷² This problem is just one of a series of the Westphalian model. States might even disregard human and fundamental rights of their own peoples due to political (or economic) interests in trade relations with a particular country or group of countries in the name of ‘diplomacy’. As I have argued in this

³⁷¹ Witte, 1985, p. 119.

³⁷² Roff, Heather M., p. 1.

chapter, States tend to behave internationally like private actors, namely by their self-interests.

With regard to trade liberalisation, it can be good or bad depending on its effects over investment decisions, economic production, peoples' welfare and human rights. Thus, international trade law, multilevel trade regulation and their respective institutions are capable of generating impressive economic, social, environmental and, of course, legal outcomes worldwide. And, given that international trade law claims to regulate international economic activities and trade relations through law, organisations like the WTO and the MERCOSUR need to provide access to justice, i.e. cases must be heard in balanced proceedings – which have to guarantee legal defence, adversary systems and lawful arbitrators – and be adjudicated in accordance with substantive standards of fairness and justice. This is directly linked to the respect for human rights and is also intimately associated with the rule of law, which needs efficient checks and balances in order to work.³⁷³

At national level, governments and societies must understand that they are interdependent, share common values and are directly responsible towards each other and in charge of the national welfare, which is not a product of either one alone, but of the work of both together. So, market freedom, international trade, globalisation and multilevel trade regulation can and should lead to a common understanding at the international level.

It is clear that markets are becoming more integrated. This integration is a result of the combination of economic, trade, political and legal theories with the evident development of national societies, economies, government regimes, respect for human rights and policies towards national and international trade. I agree with *Garcia*³⁷⁴ that democratic countries have (or rather defend, one would say) national free markets that are compromises between efficiency and aggregate welfare on the one hand, and other societal values such as individual rights and distributive justice on the other. Thus, it

³⁷³ For details on the specific situation at the WTO, please see the section 'Access to Justice in the WTO' in chapter V.

³⁷⁴ Garcia, p. 212.

is perfectly rational when he compares trade institutions that operate on the international level to domestic institutions.

While rich developed countries have an abundance of capital and education, but a scarcity of unskilled workers, emerging countries have an abundance of unskilled workers (i.e., cheaper than the skilled ones), but a scarcity of capital and education, which belong to a small elite. Global trade regulation is very likely to reduce income inequalities among countries and also provide more jobs in emerging countries. One may even argue, as a result, that a global regulated market may benefit poor countries more than the rich ones. A regulated international trade is, nevertheless, not invulnerable and can be reversed. A world war, an international depression or public policies can do just that. Thus, avoiding any of these cases depends on members of governments, economists and business administrators. The law and a cooperation among courts, tribunals, *Ad Hoc* tribunals and court-like bodies also needs the support of governments and the appropriate national, international and supranational institutions.

Chapter III

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The Brazilian Dimension of Access to Justice

1. Introduction to Chapter III

“Art. 5 - All persons are equal before the law, without any distinction whatsoever, Brazilians and foreigners residing in the country being ensured of inviolability of the right to life, to liberty, to equality, to security and to property, on the following terms:

(...)

XXXV - the law shall not exclude any injury or threat to a right from the consideration of the Judicial Power.”³⁷⁵

This chapter is about access to justice in Brazil. As a result, I begin by tracing the historical development of the concept in the different constitutional periods of the country. This is important because Brazil had a series of revolutions, *coups d’ état*, institutional ruptures and repressions, besides having different authoritarian and dictatorial regimes, which manifestly allowed governmental abuses of power and, as a result, affected a range of human rights, amongst others the right of access to justice.

Subsequent sections of the chapter describe the manner in which the infra-constitutional legislation is organised, the relation of Brazilian constitutional law to international treaties, and the present organisation of the national judiciary. It also provides an overview of the role of judges in the country, examines ‘*súmulas*’ and ‘*súmulas vinculantes*’, and analyses non-State-owned means of dispute settlement (also known as alternative dispute settlement procedures). In the conclusion of the

³⁷⁵ Art. 5, XXXV of the Brazilian Federal Constitution of 1988, which is the current *Magna Carta* of the country. The original text in Portuguese can be found below.

“Art. 5º Todos são iguais perante a lei, sem distinção de qualquer natureza, garantindo-se aos brasileiros e aos estrangeiros residentes no País a inviolabilidade do direito à vida, à liberdade, à igualdade, à segurança e à propriedade, nos termos seguintes:

(...)

XXXV - a lei não excluirá da apreciação do Poder Judiciário lesão ou ameaça a direito;”

chapter, I refer to the crisis that the right of access to justice is experiencing and propose some solutions for the problems at national and external levels.

2. Historical Constitutional Analysis about Access to Justice in Brazil

Until the early years of the nineteenth century, there were neither ordinances nor any type of legislative act in Brazil to safeguard the people's right to invoke the judiciary in cases of infringements, obstructions and menaces to individual rights. Intriguingly, these circumstances and the issue concerning access to justice did not arouse much interest among the scholars of that time.³⁷⁶ The defence and recovery of individual fundamental rights (civil, political, economic, social, cultural, etc.) result from a long historical process. The same applies to the right of access to justice. For *Dürig*,³⁷⁷ fundamental rights constitute a system of values and guarantees of the human being in regards to the State. Access to justice as a fundamental right is relatively recent in Brazil. The first *Magna Carta* that it was included in was the Federal Constitution of 1946.

2.1. Imperial Period

From the beginning of the colonisation of Brazil by the Portuguese crown around the year 1530, and for over another two centuries, there was no, or very little, progress with reference to access to justice and the protection of rights through jurisdiction in an equal way for everybody.³⁷⁸

Perhaps influenced by the French Constitution of 1791, the 1824 Constitution of Brazil tried to ensure a list of civil and political rights, and provided a timid due process of law, which was meant to be the only applicable means to convict somebody, as well as to take his properties and possessions.³⁷⁹ But, having access to

³⁷⁶ Paroski, p. 170-171.

³⁷⁷ Dürig, Günter, *Einführung zum Grundgesetz*, München, 1996, p. 10.

³⁷⁸ Peroski, p. 172.

³⁷⁹ For more details, see Art. 179 of the Brazilian Constitution of 1824.

courts, being represented by an attorney and being able to pay all the costs involved were privileges enjoyed by very few people at that time.

2.2. Constitution of 1891

The first Constitution of the republican period was that of 1891. With its new ideas and political and economic concepts, it broke the structure of the Constitution of the imperial period. The main innovations it brought was the separation (or distribution) of powers with the revocation of the Emperor's moderating power. As a result, three separate organs with executive, legislative and judicial competencies, respectively, were created. This Constitution followed a similar path to the constitutions of England and France, thus following the Greek theory of Aristotle and Montesquieu, respectively. Some authors,³⁸⁰ however, argue that the Brazilian Constitution of 1891 was inspired by the U.S. Constitution of 1787, because of a power shift from a strong and centralised unitary system to a federal one.

With regard to the right of access to justice, the fact is that this Brazilian Constitution did not explicitly provide for them.³⁸¹ Moreover, it did not provide for any social rights at all.

2.3. Constitution of 1934

The constitution of 1934 is considered a legal and political document of great scientific value, because it imposed a social democratic regime in Brazil. This was a direct influence of the Weimar Constitution of 1919.³⁸² The 1934 constitution tried to create an economic-social dominium, conciliate federalism with unitarism in the

³⁸⁰ E.g. Barbosa-Fohrmann, Ana P./Moura, Aline da C. de, *The Rule of Law in Brazil*, in: Koetter, Matthias/Folke Schuppert, Gunnar, *Understandings of the Rule of Law in Various Legal Orders of the World*, Rule of Law Working Paper Series, Nr. 19, Freie Universität Berlin, Berlin, 2011, p. 3. It can be found at <http://wikis.fu-berlin.de/display/SBprojectrol/Home>. Date of Access: 12th November 2013.

³⁸¹ For more details, see Articles 72 to 78 of the Brazilian Constitution of 1891.

³⁸² Bastos, Celso Ribeiro, *Curso de Direito Constitucional*, 11th ed., São Paulo, 1989, p. 62-63 quoted in Peroski, p. 176.

political sector, and presidentialism with parliamentarism in the governmental sphere.³⁸³ This was also the constitution that created the Class Action and legal aid for needy people,³⁸⁴ besides the right to education for all Brazilians and foreigners domiciled in the country, several rights for workers and family assistance. Another innovation that is worth mentioning is that the right to vote was extended to women, but not to beggars and illiterates.³⁸⁵

Nonetheless, the Constitution of 1934 was not the *Magna Carta* that succeeded in making explicit the right of access to justice. This shows, as a result, that Brazil was significantly delayed with regard to, for example, the Mexican Constitution of 1917, whose original text defined access to justice in 3 major Articles: 17, 18 and 19.³⁸⁶

³⁸³ Peroski, p. 176.

³⁸⁴ Art. 113 - *A Constituição assegura a brasileiros e a estrangeiros residentes no País a inviolabilidade dos direitos concernentes à liberdade, à subsistência, à segurança individual e à propriedade, nos termos seguintes:*

(...)

32) *A União e os Estados concederão aos necessitados assistência judiciária, criando, para esse efeito, órgãos especiais assegurando, a isenção de emolumentos, custas, taxas e selos.*

(...)

38) *Qualquer cidadão será parte legítima para pleitear a declaração de nulidade ou anulação dos atos lesivos do patrimônio da União, dos Estados ou dos Municípios.*

³⁸⁵ Art 108 - *São eleitores os brasileiros de um e de outro sexo, maiores de 18 anos, que se alistarem na forma da lei.*

Parágrafo único - Não se podem alistar eleitores:

a) *os que não saibam ler e escrever;*

b) *as praças-de-pré, salvo os sargentos, do Exército e da Armada e das forças auxiliares do Exército, bem como os alunos das escolas militares de ensino superior e os aspirantes a oficial;*

c) *os mendigos;*

d) *os que estiverem, temporária ou definitivamente, privados dos direitos políticos.*

³⁸⁶ Art. 17°. *Nadie puede ser aprisionado por deudas de carácter puramente civil. Ninguna persona podrá hacerse justicia por sí misma ni ejercer violencia para reclamar su derecho. Los tribunales estarán expeditos para administrar justicia en los plazos y términos que fije la ley; su servicio será gratuito, quedando, en consecuencia, prohibidas las costas judiciales.*

Art. 18°. *Sólo por delito que merezca pena corporal habrá lugar a prisión preventiva. El sitio de ésta será distinto del que se destinare para la extinción de las penas y estarán completamente separados.*

Los Gobiernos de la Federación y de los Estados organizarán, en sus respectivos territorios, el sistema penal -colonias, penitenciarías o presidios- sobre la base del trabajo como medio de regeneración.

Art. 19°. *Ninguna detención podrá exceder del término de tres días, sin que se justifique con un auto de formal prisión, en el que se expresarán: el delito que se impute al acusado; los elementos que constituyen aquél; lugar, tiempo y circunstancias de ejecución, y los datos que arroje la averiguación previa, los que deben ser bastantes para comprobar el cuerpo del delito y hacer probable la responsabilidad del acusado. La infracción de esta disposición hace responsable a la autoridad que ordene la detención, o la consienta y a los agentes, ministros, alcaides o carceleros que la ejecuten.*

Todo proceso se seguirá forzosamente por el delito o delitos señalados en el auto de formal prisión. Si en la secuela de un proceso apareciera que se ha cometido un delito distinto del que se persigue, deberá aquél ser objeto de acusación separada, sin perjuicio de que después pueda decretarse la acumulación, si fuere conducente.

Todo maltratamiento en la aprehensión o en las prisiones; toda molestia que se infiera sin motivo legal; toda gabela o contribución en las cárceles, son abusos, que serán corregidos por las leyes y reprimidos por las autoridades.

2.4. Constitution of 1937

The 1937 constitution was a democratic regression, as it conferred nearly absolute powers to the President – *Getúlio Dorneles Vargas*, at that time – and was inspired by the April Constitution of 1935 in Poland and the Italian fascist model of *Benito Mussolini*. Vargas enforced a new and authoritarian Constitution for Brazil in a *coup d'état*, put the Congress out of operation and assumed dictatorial powers. This period in the history of Brazil became known as '*Estado Novo*' ('New State', in English), which began in 1937 and ended in 1945.

2.5. Constitution of 1946

Its constitutional text explicitly defines that access to the Judicial Power is a fundamental right, contemplating it in its Art. 141, § 4, whose wording is below:

“Art. 141. The Constitution guarantees to Brazilians and foreigners residing in the country the inviolability of their rights regarding life, liberty, personal safety and property, as follows:

(...)

§ 4 The law may not exempt from review by the Judiciary any injury to individual rights.”³⁸⁷

This was the first text to ensure to Brazilians and foreigners residing in the country their right to have access to courts. Thus, this was the first participation of the State in strengthening the judicial protection of individual rights and, in that way, it also recognised their social importance.³⁸⁸

³⁸⁷ Art. 141. A Constituição assegura aos brasileiros e aos estrangeiros residentes no País a inviolabilidade dos direitos concernentes à vida, à liberdade, a segurança individual e à propriedade, nos termos seguintes:

(...)

§ 4º A lei não poderá excluir da apreciação do Poder Judiciário qualquer lesão de direito individual.

³⁸⁸ Paroski, p. 180.

But, on 31st March 1964 a military coup occurred – this coup is also known as the Revolution of 1964 – which, among other measures, limited individual rights and constitutional guarantees to a high degree. The expression ‘Revolution’ was adopted by the military, which understood the measure as necessary for a better future of the country. This putsch put an end to the government of President *João Goulart*, who was considered by some as a leftist. He was Vice-President of President *Jânio Quadros*, who was considered conservative. Both were democratically elected in 1960 according to the standards of the 1946 Constitution. At that time, differently from today, citizens voted separately for the President and Vice-President. This is also the reason why both politicians belonged to different parties. *Jânio Quadros*, nonetheless, was President of Brazil for a very short period of time: 1st January 1961 to 25th August 1961, when he resigned without exactly saying why. The reason for his resignation continues to be a mystery, as he wrote in his resignation letter that “(...) terrible forces have risen up against me, and intrigue and defame me, even under the excuse of collaboration.”³⁸⁹⁻³⁹⁰

The main reasons for the military coup after the resignation of *Jânio Quadros* were the accusations that *João Goulart* was a communist.³⁹¹

2.6. Constitution of 1967

The constitution of 24th January 1967 was enacted and promulgated by the national Congress when this was still formed by representatives that were elected by the citizens, that is, in a democratic manner, even though the military regime was already in force.

³⁸⁹ In Portuguese: “*Forças terríveis levantam-se contra mim e me intrigam ou infamam, até com a desculpa da colaboração.*”

³⁹⁰ Oliveira, Paulo Affonso Martins de, *O Congresso em Meio Século: Depoimento a Tarcísio Holanda*, 2nd ed., Brasília, 2009, p. 60. It can be found at the website of the ‘*Câmara dos Deputados*’ (the Brazilian House of Representatives):

http://bd.camara.gov.br/bd/bitstream/handle/bdcamara/1859/congresso_meio_seculo_oliveira.pdf?sequence=1

³⁹¹ Mostly due to his policies towards the recommencement of relations with communist countries within some of the most delicate years of the Cold War and the creation of a limitation concerning the amount of profits that foreign companies operating in Brazil could transfer abroad.

It is important to call attention to what Art. 150, § 4 of the Constitution of 1967 said:

“Art. 150. The Constitution ensures to Brazilians and foreigners residing in the country the inviolability of their rights to life, liberty, security and property, as follows:

(...)

§ 4 - the law shall not exclude any injury or threat to a right from the consideration of the Judicial Power.”³⁹²

Art. 150 and its paragraphs contained the list of fundamental rights.³⁹³ Nevertheless, in 1968, the same *Magna Carta* ironically withdrew the constitutional guarantees of the population.

In December 1968, through Complementary Act Nr. 38, the military declared a Congress recess and suspended the bench’s guarantees. Furthermore, in accordance with Constitutional Amendment Nr. 1 of 17th October 1969, which was imposed by the Ministers of War, Army and Air Force, acts performed by the regime’s command, by military ministers holding the status of President, by State legislatures and city councils were excluded from the legal review of the judiciary.³⁹⁴ Thus, these changes became a contradiction to fundamental rights and guarantees defined by the same constitution. In addition, the entire police and military apparatus, as well as public institutions, were at the new arbitrary regime’s command.

³⁹² Art. 150. A Constituição assegura aos brasileiros e aos estrangeiros residentes no País a inviolabilidade dos direitos concernentes à vida, à liberdade, à segurança e à propriedade, nos termos seguintes:

(...)

§ 4º - A lei não poderá excluir da apreciação do Poder Judiciário qualquer lesão de direito individual.

³⁹³ Differently from what the chapeau of the equivalent article of the present Constitution says (Art. 5), the chapeau of Art. 150 of the 1967 Constitution did not determine that Brazilians and foreigners residing in the country are equal before the Law (the right to equality).

³⁹⁴ Article 181 of the Constitutional Amendment: *Ficam aprovados e excluídos de apreciação judicial os atos praticados pelo Comando Supremo da Revolução de 31 de março de 1964, assim como:*

I - os atos do Governo Federal, com base nos Atos Institucionais e nos Atos Complementares e seus efeitos, bem como todos os atos dos Ministros Militares e seus efeitos, quando no exercício temporário da Presidência da República, com base no Ato Institucional nº 12, de 31 de agosto de 1966;

II - as resoluções, fundadas em Atos Institucionais, das Assembléias Legislativas e Câmaras Municipais que hajam cassado mandatos eletivos ou declarado o impedimento de governadores, deputados, prefeitos e vereadores quando no exercício dos referidos cargos; e

III - os atos de natureza legislativa expedidos com base nos Atos Institucionais e Complementares indicados no item I.

2.7. Constitution of 1988

The issue of access to justice began to transform only in the 1980s after the end of the military dictatorship. The Constitution of 1988, which is the present Constitution of Brazil, established the restoration of democracy as a supreme value, the choice for a *Estado de Direito*³⁹⁵ (*Rechtsstaat*) and formulated the protection of fundamental rights as the core of the entire legal order.³⁹⁶ The Brazilian *Magna Carta* enshrines the right of access to justice in its Art. 5, XXXV, which determines that:

“Art. 5 - All persons are equal before the law, without any distinction whatsoever, Brazilians and foreigners residing in the country being ensured of inviolability of the right to life, to liberty, to equality, to security and to property, on the following terms:

(...)

XXXV - the law shall not exclude any injury or threat to a right from the consideration of the Judicial Power;”

Among the Brazilian constitutional norms this is the one that gives the greatest protection to the right of access to justice. This guarantee is also called ‘inseparability of judicial control’.

In defining that “the law shall not exclude any injury or threat to a right from the consideration of the Judicial Power”,³⁹⁷ the Constitution regulates the right to file an action in a broad way that, nevertheless, is in harmony with its Art. 1, which defines that:

³⁹⁵ Preamble of the Constitution:

Nós, representantes do povo brasileiro, reunidos em Assembléia Nacional Constituinte para instituir um Estado Democrático, destinado a assegurar o exercício dos direitos sociais e individuais, a liberdade, a segurança, o bem-estar, o desenvolvimento, a igualdade e a justiça como valores supremos de uma sociedade fraterna, pluralista e sem preconceitos, fundada na harmonia social e comprometida, na ordem interna e internacional, com a solução pacífica das controvérsias, promulgamos, sob a proteção de Deus, a seguinte CONSTITUIÇÃO DA REPÚBLICA FEDERATIVA DO BRASIL.

³⁹⁶ Art. 5º. Todos são iguais perante a lei, sem distinção de qualquer natureza, garantindo-se aos brasileiros e aos estrangeiros residentes no País a inviolabilidade do direito à vida, à liberdade, à igualdade, à segurança e à propriedade, nos termos seguintes:

(...)

³⁹⁷ Art. 5, XXXV of the Brazilian Constitution.

“The Federative Republic of Brazil, formed by the indissoluble union of the states and municipalities and of the Federal District, is a legal democratic state and is founded on:

I - sovereignty;

II - citizenship;

III - the dignity of the human person;

IV - the social values of labour and of the free enterprise;

V - political pluralism.

Sole paragraph - All power emanates from the people, who exercise it by means of elected representatives or directly, as provided by this Constitution.”

However, Art. 5, XXXV also has a political significance, as it places under the control of the judicial bodies all kinds of legal crises that may generate dissatisfaction among people.³⁹⁸ Also Art. 5, II and Art. 5, LIV deserve to be highlighted as they define that “no one shall be obliged to do or refrain from doing something except by virtue of law”³⁹⁹ and “no one shall be deprived of freedom or of his assets without the due process of law”,⁴⁰⁰ respectively. Furthermore, Art. 5, XXXVI defines that “the law shall not injure the vested right, the perfect juridical act and the *res judicata*”⁴⁰¹ and Art. 5, XXXIX states that “there is no crime without a previous law to define it, nor a punishment without a previous legal commination”.⁴⁰² Dinamarco⁴⁰³ defends the viewpoint that access to justice has a previous, an intermediate and a final content. The previous content is to enter a court of law, the intermediary is to develop fair and balanced proceedings – which include guarantees such as legal defence, adversary system, lawful judge, etc. – and the final is just and effective legal protection. Therefore, the constitutional process must be ongoing and continue to be built by the interpretation of courts.

³⁹⁸ For details, see Dinamarco, Cândido Rangel, *Instituições de Direito Processual Civil*, São Paulo, 2001, p. 198-199.

³⁹⁹ “ninguém será obrigado a fazer ou deixar de fazer alguma coisa senão em virtude de lei;”

⁴⁰⁰ “ninguém será privado da liberdade ou de seus bens sem o devido processo legal;”

⁴⁰¹ “a lei não prejudicará o direito adquirido, o ato jurídico perfeito e a coisa julgada;”

⁴⁰² “não há crime sem lei anterior que o defina, nem pena sem prévia cominação legal;”

⁴⁰³ Dinamarco, Cândido Rangel, p. 115.

The right to file a suit as a public subjective right to request the jurisdictional tutelage of the state is presented as a ‘*civic and abstract*’⁴⁰⁴ right, and is instrumental in initiating the judicial function, becoming the main mechanism of positivation in the legal system. In Brazil, the state has the duty to enable legal protection because it has the monopoly of jurisdiction, and individual unlimited self-protection is not allowed. But, sometimes, a common problem that is not restricted to Brazil is that adjudication may tend to follow traditional views that no longer reflect the present factual reality. For *Wolfe*,⁴⁰⁵ while a codified system of law (i.e., civil law) shows what the law was, common law changes over time with the development of society.⁴⁰⁶ This makes him conclude that codified law is not law, but what people believe that the law is. Also *Friedrich Carl von Savigny* spoke against codification, as he argued that “law is not something created through legislation that parliaments initiate or plan”,⁴⁰⁷ “the locus of law is not state legislation but the daily customs and practices of a people and the notions and understandings prevalent among them”,⁴⁰⁸ and parliaments are not the creators of law but simply the “law’s legislator”.⁴⁰⁹

In terms of Brazilian trade law, the right of access to justice also has to be understood in connection with the MERCOSUR and the WTO, since Brazil is a founding member of both organisations. Thus, rule of law in Brazil should be defined with due regard to both MERCOSUR law and WTO law. In judicial practice, though, judges do not have a common understanding of the influences of the MERCOSUR and the WTO on domestic law and, thus, on the overall conception of rule of law.⁴¹⁰ As a result, Brazilian courts repeatedly neglect to interpret Brazilian trade rules in conformity

⁴⁰⁴ The expression is used in Nery Junior, Nelson, *Princípios Constitucionais Processuais*, 5th ed., São Paulo, 1999.

⁴⁰⁵ Robert Wolfe is Professor of ‘Approaches to Policy Analysis’ and ‘Trade Policy and Public Policy’ at the School of Policy Studies of Queen’s University in Kingston, Ontario, Canada.

⁴⁰⁶ Information based on notes from a personal conversation with Professor Robert Wolfe when he visited the European University Institute in Florence in December 2011 to give a lecture.

⁴⁰⁷ Mautner, Menachem, *Three Approaches to Law and Culture*, in: *Cornell Law Review*, Vol. 96, 2011, pp. 839-867, at p. 845.

⁴⁰⁸ Berkowitz, Roger, *The Gift of Science: Leibniz and the Modern Legal Tradition*, 2005, p. 113; Reiss, Hans S., *The Political Thought of the German Romantics*, in: Reiss, Hans S. (Ed.), *The Political Thought of the German Romantics 1793-1815*, 1955, 38 f.; Savigny, Carl Friedrich von, *On the Vocation of our Age for Legislation and Jurisprudence*, in: *The Political Thought of the German Romantics 1793-1815*, 1955, p. 205 f., all quoted in Mautner, p. 845.

⁴⁰⁹ Berkowitz, Roger, p. 114 and 117 f., quoted in Mautner, p. 845.

⁴¹⁰ For more details, see, in this thesis: section 1.2 ‘Brazilian Constitutional Law and International Treaties’, section 1.3(a) ‘Mercosur Law and Brazilian Constitutional Law’ and section 1.4(a) ‘WTO Law and National Brazilian Law’.

with MERCOSUR and WTO obligations and, accordingly, promote both organisations' objectives. This puts the security and predictability of the multilateral trading system at risk. At MERCOSUR level, nevertheless, a remedy to help build a common understanding and consistent interpretation has been developed: the *Opini3n Consultiva*.⁴¹¹ It can be requested by all the Member States of the MERCOSUR together, the MERCOSUR decision-making bodies, and independently by every one of the Member States' highest courts (and lower courts through the highest courts).⁴¹²

3. Infra-Constitutional Legislation about Access to Justice

In order to meet the needs of new times, laws have been passed to accelerate proceedings, improve the rules of procedure and develop access to justice. The main laws with these goals are:

- Law Nr. 1,060 of 1950 about legal aid for needy people;
- Law Nr. 5,584 of 1970 that regulates legal aid for needy people in labour claims;
- Complementary Law Nr. 80 of 1994, which organises the Public Legal Defence of the Union, of the Federal District and of the territories, and specifies general rules of organisation for the States;
- Law Nr. 9,099 of 1995 about the creation of Local District Courts at judicial state level for civil claims of small economic value and also criminal cases with low potential of danger;
- Law Nr. 10,259 of 2001 about the creation of federal Local District Courts at judicial federal level for civil claims of small economic value and also criminal cases with low potential of danger.⁴¹³⁻⁴¹⁴

⁴¹¹ '*Opini3o Consultiva*' in Portuguese (the English translation is 'Advisory Opinion'). Foreseen in Art. 3 of the Protocol of Olivos, it corresponds to the Preliminary Rulings of the ECJ and is for issues regarding the validity and interpretation of Mercosur Law. However, it has no binding effect.

⁴¹² For more details, see the section about the '*Opini3n Consultiva*' in the chapter about the Mercosur.

⁴¹³ It is similar to Law Nr. 9,099/1995, but specific for cases of exclusive jurisdiction of the Federal judiciary.

⁴¹⁴ See the section 'Present Organisation of the Brazilian Judiciary' of this thesis and Art. 92 of the Brazilian Constitution in order to better understand the Judicial Power in Brazil.

But, it makes little sense to have norms that aim to change practices that are deeply rooted in the conduct of those who ‘move’ judicial activities if the objectives of those alterations are not understood or are not desired at all. It is, therefore, basically a matter of accepting and implementing new ideas, which are unquestionably essential to make transformations. In this respect, law teaching in Brazil is, however, standardised and held hostage by a ‘text book culture’. The *stricto sensu* operability of law is plunged into a crisis of both qualitative and quantitative effectiveness.⁴¹⁵ Basic legal education is not enough anymore, as law professionals need an ethical and humanistic education as well. It is precisely because of the proliferation of low level Law Schools that specific examinations to work as, e.g., an attorney, a judge or public prosecutor, to name but a few, were created by the respective professional associations. Currently, State capitals are the home of the best Law Schools.

Another cause for concern is that once judges, public prosecutors and attorney generals are approved for their offices, there are no incentives for updating, specialisation, professional development and postgraduate courses.⁴¹⁶ Attorneys in large law firms, by contrast, tend to specialise and update themselves in certain legal fields. Nevertheless, there are still few professionals with practical knowledge about the interaction of national law, the law of integration and international law.

4. Brazilian Constitutional Law and International Treaties

This section analyses the relation between Brazilian constitutional law and international treaties as a whole. For the particular relation between MERCOSUR law and Brazilian constitutional law, please see the specific section on the matter.

In the Brazilian legal system, there are a number of constitutional obstacles to both the implementation and enforcement of international law⁴¹⁷ as well as the creation of possible supranational institutions with decision-making power. Firstly, the Brazilian Federal Constitution follows the dualist theory for the incorporation of international

⁴¹⁵ For details, see Streck, Lenio Luiz, *Verdade e Consenso*, 2nd ed., Rio de Janeiro, 2008, pp. 365-366.

⁴¹⁶ Hess, p. 200.

⁴¹⁷ Including the Mercosur Law of Integration.

norms into the national legal system. According to Articles 49, I⁴¹⁸, 84, IV⁴¹⁹ and 84, VIII⁴²⁰ of the Brazilian *Magna Carta*, the incorporation of treaties, agreements and other international acts into the Brazilian legal order depends on the will of the National Congress and the President of the country. The complexity of the matter is demonstrated by Articles 49, I and 84, VIII of the constitution. While Art. 49, I reads “It is exclusively the competence of the National Congress: I – to decide conclusively on international treaties, agreements or acts which result in charges or commitments that go against the national property”, Art. 84, VIII defines that “The President of the Republic shall have the exclusive power to: (...) VIII – conclude international treaties, conventions and acts, *ad referendum* of the National Congress”. So, treaties signed by the Executive only become valid if the National Congress agrees with their national validity. Once these procedures are fulfilled, acts have national legal effect and can be considered part of the Brazilian legal system.

When the President, as head of the Brazilian Executive, signs a treaty, he sends it to the Legislative through the Ministry of Foreign Affairs, which is also in charge of analysing the text, providing a statement of the reasons to sign the treaty and presenting other basic documents. If the Legislative Power approves the treaty, it does so by means of a *Decreto Legislativo* (legislative decree, in English). This *Decreto Legislativo*, as a result, allows the President to ratify the treaty. Nevertheless, the ratification is still not enough to make the treaty valid national law in Brazil, as there is one more step to be taken by the President, namely he has to promulgate it via another decree, the *Decreto Executivo* (executive decree, in English), that he has to pass.⁴²¹

⁴¹⁸ Art. 49. *É da competência exclusiva do Congresso Nacional:*

I - resolver definitivamente sobre tratados, acordos ou atos internacionais que acarretem encargos ou compromissos gravosos ao patrimônio nacional;

⁴¹⁹ Art. 84. *Compete privativamente ao Presidente da República:*

IV - sancionar, promulgar e fazer publicar as leis, bem como expedir decretos e regulamentos para sua fiel execução;

⁴²⁰ VIII - *celebrar tratados, convenções e atos internacionais, sujeitos a referendo do Congresso Nacional;*

⁴²¹ Bahia, Saulo José Casali, *Tratados Internacionais no Direito Brasileiro*, Rio de Janeiro, 2000, p. 67, and Mazzuoli, Valério de Oliveira, *Curso de Direito Internacional Público*, São Paulo, 2007, p. 282, quoted in Marques, Claudia Lima/Lixinski, Lucas, *Treaty Enforcement by Brazilian Courts: Reconciling Ambivalences and Myths?*, in: *IV Anuário Brasileiro de Direito Internacional*, Vol. 1, Belo Horizonte, 2009, p. 144.

Secondly, in Brazil there is an important difference concerning the international and the national enforceability of a treaty. While the deposit of the instrument of ratification brings the treaty into force internationally, it depends on its promulgation through the Executive Decree in order to become effective nationally and, as a result, be enforceable before national courts. There was a case before the Federal Supreme Court (*Supremo Tribunal Federal – STF*)⁴²²⁻⁴²³ involving civil cooperation in the MERCOSUR⁴²⁴ in which the court argued that it could not apply the treaty because it had not yet been published in the *Diário Oficial da União* (Official Journal, in English)⁴²⁵ although the ratification instrument had been deposited. On the other hand, the Brazilian Constitution has no provision concerning this “internal publication rule” for the enforceability of treaties.

With regard to international acts to complement existing treaties, there are scholars, among whom *José Francisco Rezek*,⁴²⁶ who argue that, since the main treaties have already been approved and following acts have to conform with them, congressional approval is implied.⁴²⁷ Case law also confirms this.⁴²⁸

⁴²² The Federal Supreme Court is in charge of the control of constitutionality given that its main role is to guard and interpret the Constitution and it is responsible for deciding matters that concern the Constitution, which namely comprise norms that originate in international acts.

⁴²³ Art. 102. *Compete ao Supremo Tribunal Federal, precipuamente, a guarda da Constituição, cabendo-lhe:*

(...)

III - julgar, mediante recurso extraordinário, as causas decididas em única ou última instância, quando a decisão recorrida:

(...)

b) declarar a inconstitucionalidade de tratado ou lei federal;

⁴²⁴ For details, see Araújo, Nadia de, *Dispute resolution in Mercosur: The Protocol of Las Leñas and the case law of the Brazilian Supreme Court*, in: *The University of Miami Inter-American Law Review*, Vol. 32, Miami, 2001, pp. 25-56, quoted in Marques, Claudia Lima/Lixinski, Lucas, p. 145. It is available at www.jstor.org/stable/40176522. Date of access: 28th July 2010.

⁴²⁵ STF, *Carta Rogatória (Rogatory Letter, in English) Nr. 8,279 from Argentina*. Date of the judgment: 4th May 1998.

⁴²⁶ *Subprocurador Geral da República* (Associate Attorney General) from 1972 to 1983, Judge at the *Supremo Tribunal Federal* (Brazil's court of highest instance) from 1983 to 1997 and Judge at the International Court of Justice from 1997 to 2006.

⁴²⁷ Rezek, José Francisco, *Direito dos Tratados*, Rio de Janeiro, 1984, p. 385; Rodas, João Grandino, *A Publicidade dos Tratados Internacionais*, São Paulo, 1980, p. 200 f.

⁴²⁸ E.g. Federal Regional Court of the Second Region, *Remessa Ex Officio (Ex Officio Request, in English) Nr. 9002165641/RJ*, judgment of October 1, 1991, and also Federal Regional Court of the Second Region, *Apelação em Mandado de Segurança (Appeal on writ of mandamus, in English) 95.02.27342-7/RJ*, judgment of April 30, 1996, both quoted in Marques, Claudia Lima/Lixinski, Lucas, p. 144.

Thirdly, following the incorporation procedure comes the positioning of the norms into the national Law hierarchy, namely with a status that is inferior to the Brazilian Constitution so as to be subject to constitutional control and judicial review. As a matter of fact, since 1977 the STF has considered international treaties to have the equivalent status of ordinary federal legislation,⁴²⁹ and lower courts follow this understanding – although decisions of the STF are usually not binding on the entire judiciary, but rather just applicable to the case.⁴³⁰

So, international treaties that have already been ratified may lose their efficacy if statutory laws on the same issues are enacted. By having the status of federal legislation, international treaties are subject to principles of conflicts of laws in time, e.g. *lex posterior derogat priori* and *lex posterior generalis non derogate legi priori speciali*. Nevertheless, there are 3 exceptions to this parity understanding: international treaties about (1) human rights,⁴³¹ (2) extradition of non-nationals⁴³² and (3) taxation matters⁴³³. In fact, the only express provision in the entire Brazilian law concerning international law supremacy is in the Brazilian Tax Code.

According to some authors, though, there is a 4th exception, namely treaties on arbitration. They base that argument on Art. 34 of law Nr. 9,307 of 1996, according to which “a foreign arbitral award will be enforced in Brazil in conformity with international treaties valid in the internal legal order, and, in their absence, strictly in accordance with the provisions of the Arbitration Act”⁴³⁴. This “4th exception” to the parity understanding would, among others, strengthen the ‘MERCOSUR exemption’, but there are still no court decisions about this “new exception”.

⁴²⁹ For details, see STF, *Recurso Extraordinário (Extraordinary Appeal, in English) Nr. 80.004-SE*.

⁴³⁰ There is just one exception, namely the *Súmula Vinculante* (“binding precedents”, in English), which are few in number and specific to consolidated Case Law that should become binding on the entire judiciary.

⁴³¹ Brazilian Constitution, Art. 5, § 3 - The international treaties and conventions on Human Rights, which are approved in each House of the National Congress, in two rounds by three fifths of votes of the respective members will be equivalent to Constitutional Amendments.

⁴³² Extradition of non-nationals bilateral Treaties, which are considered by the STF as *lex speciales*. For details, see Barroso, Luís Roberto, *Constituição e Tratados Internacionais: Alguns Aspectos da Relação entre Direito Internacional e Direito Interno*, in: Direito, Carlos A. M./Trindade, Antonio A. C./Pereira, Antonio C. A., *Novas Perspectivas do Direito Internacional Contemporâneo*, Nr. 189, Rio de Janeiro, 2008.

⁴³³ Art. 98 of the Brazilian Tax Code. This supremacy of international law over municipal legislation “has been consistently affirmed by the Brazilian judiciary” (Marques, Claudia Lima/Lixinski, Lucas, p. 147).

⁴³⁴ Marques, Claudia Lima/Lixinski, Lucas, p. 146.

The 1988 Constitution is described by some as a ‘democratic Constitution’ because it contains text that elevates Brazil to both a *Estado de Direito* (*Rechtsstaat*) and democratic State.⁴³⁵ In it, the principle of sovereignty appears in several provisions and can be considered a fundamental principle.⁴³⁶ According to Rezek,⁴³⁷ it is the recognition of the sovereignty of the Brazilian rule of law at the international law level that enables the Federal Constitution to determine the ‘positions’ of treaties and other international acts in domestic law. Consequently, this presents a lot of challenges for the perfecting of the MERCOSUR integration process and overall international acts celebrated by Brazil. Furthermore, it is worth pointing out that, since MERCOSUR norms are also subject to the scrutiny of the STF, huge juridical instability may arise from conflicts of interpretation and application of those rules.

The STF has in fact already referred to the reception of international instruments which Brazil entered into in the MERCOSUR and equated them to international treaties and conventions in general. While it acknowledged that a different incorporation for MERCOSUR acts is desirable, it affirmed that the current Brazilian constitutional system does not enshrine the principles of direct effect or immediate applicability of international treaties and conventions. It also stated that MERCOSUR norms that were not implemented in Brazil can neither be invoked by private parties nor applied domestically until all necessary steps for their entering into force have been performed.⁴³⁸ This is one among several examples of how problematic the sovereignty issue may become in Brazil. On the other hand, despite the debate about

⁴³⁵ Preamble of the Brazilian Constitution: *We, the representatives of the Brazilian People, convened in the National Constituent Assembly to institute a Democratic State, for the purpose of ensuring the exercise of social and individual rights, liberty, security, well-being, development, equality and justice as supreme values of a fraternal, pluralist and unprejudiced society, founded on social harmony and committed, in the internal and international orders, to the peaceful settlement of disputes, promulgate, under the protection of God, this CONSTITUTION OF THE FEDERATIVE REPUBLIC OF BRAZIL.*

⁴³⁶ Art. 1. *The Federative Republic of Brazil, formed by the indissoluble union of the states and municipalities and of the Federal District, is a legal democratic state and is founded on:*

I - sovereignty;

II - citizenship;

III - the dignity of the human person;

IV - the social values of labour and of the free enterprise;

V - political pluralism.

Sole paragraph - All power emanates from the people, who exercise it by means of elected representatives or directly, as provided by this Constitution.

⁴³⁷ Rezek, José Francisco, *Direito Internacional Público*, São Paulo, 2000, p. 96.

⁴³⁸ STF, CR 8,279/Arg – 17th June 1998.

the real meaning of sovereignty in the current context, we must bear in mind that the classical concept of this principle is no longer applicable in the globalised world in which we live, and the legal system and its principles must have a dynamic character. Like any other national supreme court, the STF may also modify its interpretations in the future and create a new understanding for MERCOSUR norms that have not been implemented in Brazil. This will depend on the characteristics of the particular cases brought to it and the arguments of the parties involved.

5. Present Organisation of the Brazilian Judiciary

According to Art. 92 of the Brazilian Constitution, the bodies of the Brazilian Judicial Power are⁴³⁹:

- I - the Federal Supreme Court;
- I-A - the National Council of Justice⁴⁴⁰;
- II - the Superior Court of Justice;
- III - the Federal Regional Courts and the Federal Judges;
- IV - the Labour Courts⁴⁴¹ and Judges;
- V - the Electoral Courts⁴⁴² and Judges;
- VI - the Military Courts⁴⁴³ and Judges;

⁴³⁹ Art. 92. *São órgãos do Poder Judiciário:*

I - o Supremo Tribunal Federal;

I-A o Conselho Nacional de Justiça; (Incluído pela Emenda Constitucional nº 45, de 2004)

II - o Superior Tribunal de Justiça;

III - os Tribunais Regionais Federais e Juízes Federais;

IV - os Tribunais e Juízes do Trabalho;

V - os Tribunais e Juízes Eleitorais;

VI - os Tribunais e Juízes Militares;

VII - os Tribunais e Juízes dos Estados e do Distrito Federal e Territórios.

§ 1º *O Supremo Tribunal Federal, o Conselho Nacional de Justiça e os Tribunais Superiores têm sede na Capital Federal. (Incluído pela Emenda Constitucional nº 45, de 2004)*

§ 2º *O Supremo Tribunal Federal e os Tribunais Superiores têm jurisdição em todo o território nacional. (Incluído pela Emenda Constitucional nº 45, de 2004)*

⁴⁴⁰ Constitutional Amendment 45, of 8th December 2004, created this clause. The mentioned amendment altered almost all articles on the Judicial Power (articles 92 to 135), added some new ones (like 103-A and 111-A) and is known as the “Reform of the Judiciary”.

⁴⁴¹ There is also a Labour superior court.

⁴⁴² There is also an Electoral superior court.

⁴⁴³ There is also a Military superior court.

VII - the Courts and Judges of the states,⁴⁴⁴ of the Federal District and of the territories.

§ 1 - The Federal Supreme Court, the National Council of Justice and the Superior Courts have their seat in the Federal Capital.⁴⁴⁵

§ 2 - The Federal Supreme Court and the Superior Courts have jurisdiction over the entire Brazilian territory.

The Judicial Power has administrative and financial autonomies.⁴⁴⁶ The judges of the different courts enjoy the guarantees of life tenure, irremovability and irreducibility of compensation, as provided by Art. 95 of the Constitutional text.⁴⁴⁷ The same guarantees are conferred to the Public Prosecutors.⁴⁴⁸⁻⁴⁴⁹

⁴⁴⁴ Includes Local District Courts (the *Juizado Especial Cível* – JEC for civil claims of small economic values, namely with values of matter in dispute of up to 40 times the national minimum salary, and the *Juizado Especial Criminal* – JECrim for criminal cases with lower offensive potential, which are specified by law Nr. 9,099/1995), District Courts and Appellate Courts, which were based on the German *Amtsgerichte*, *Landesgerichte* and *Oberlandesgerichte*, respectively.

⁴⁴⁵ Paragraph 1 was amended by the Constitutional Amendment 45 to include reference to the National Council of Justice.

⁴⁴⁶ For details, see Art. 99 of the Brazilian Constitution.

⁴⁴⁷ Art. 95. *Os juízes gozam das seguintes garantias:*

I - vitaliciedade, que, no primeiro grau, só será adquirida após dois anos de exercício, dependendo a perda do cargo, nesse período, de deliberação do tribunal a que o juiz estiver vinculado, e, nos demais casos, de sentença judicial transitada em julgado;

II - inamovibilidade, salvo por motivo de interesse público, na forma do art. 93, VIII;

~~*III - irredutibilidade de vencimentos, observado, quanto à remuneração, o que dispõem os arts. 37, XI, 150, II, 153, III, e 153, § 2º, I.*~~

III - irredutibilidade de subsídio, ressalvado o disposto nos arts. 37, X e XI, 39, § 4º, 150, II, 153, III, e 153, § 2º, I. (Redação dada pela Emenda Constitucional nº 19, de 1998)

Parágrafo único. Aos juízes é vedado:

I - exercer, ainda que em disponibilidade, outro cargo ou função, salvo uma de magistério;

II - receber, a qualquer título ou pretexto, custas ou participação em processo;

III - dedicar-se à atividade político-partidária.

IV - receber, a qualquer título ou pretexto, auxílios ou contribuições de pessoas físicas, entidades públicas ou privadas, ressalvadas as exceções previstas em lei; (Incluído pela Emenda Constitucional nº 45, de 2004)

V - exercer a advocacia no juízo ou tribunal do qual se afastou, antes de decorridos três anos do afastamento do cargo por aposentadoria ou exoneração. (Incluído pela Emenda Constitucional nº 45, de 2004)

⁴⁴⁸ Art. 128. O Ministério Público abrange:

(...)

§ 5º - Leis complementares da União e dos Estados, cuja iniciativa é facultada aos respectivos Procuradores-Gerais, estabelecerão a organização, as atribuições e o estatuto de cada Ministério Público, observadas, relativamente a seus membros:

I - as seguintes garantias:

a) vitaliciedade, após dois anos de exercício, não podendo perder o cargo senão por sentença judicial transitada em julgado;

~~*b) inamovibilidade, salvo por motivo de interesse público, mediante decisão do órgão colegiado competente do Ministério Público, por voto de dois terços de seus membros, assegurada ampla defesa;*~~

Brazil is a civil law country. Its law follows the Roman-Germanic tradition and the Judicial Power has two branches with different jurisdictions that depend on the parties involved and/or cases: one at state and another at federal level. While there are differences regarding the courts' composition, structure and competences,⁴⁵⁰ the duties and prerogatives of judges are the same. At state level, courts of first instance⁴⁵¹ make decisions on all civil and criminal matters and every state has a court of second instance, the Court of Appeals⁴⁵², which can review decisions of courts of first instance.

The federal judicial branch has '*Tribunais Regionais Federais*'⁴⁵³, which have jurisdiction over several states. Brazil has been divided into 5 zones and every zone has one different regional court. While two of them have jurisdiction over just 2 states⁴⁵⁴, there is one with jurisdiction over 13 states⁴⁵⁵.

b) inamovibilidade, salvo por motivo de interesse público, mediante decisão do órgão colegiado competente do Ministério Público, pelo voto da maioria absoluta de seus membros, assegurada ampla defesa; (Redação dada pela Emenda Constitucional nº 45, de 2004)

e) irredutibilidade de vencimentos, observado, quanto à remuneração, o que dispõem os arts. 37, XI, 150, II, 153, III, 153, § 2º, I;

c) irredutibilidade de subsídio, fixado na forma do art. 39, § 4º, e ressalvado o disposto nos arts. 37, X e XI, 150, II, 153, III, 153, § 2º, I; (Redação dada pela Emenda Constitucional nº 19, de 1998)

⁴⁴⁹ The '*Ministério Público*' ('Public Ministry', in English) is the public prosecutions office. Articles 127 to 130-A of the Federal Constitution describe it. Public prosecutors work for the *Ministério Público*.

⁴⁵⁰ The main difference can be found in the Brazilian Constitution. According to Art. 109, I, federal judges have the competence to institute legal proceedings and trials of cases in which the Union, an autonomous government agency, or a federal public company have an interest as plaintiffs, defendants, privies or interveners, with the exception of cases of bankruptcy, of job-related accidents, and of those subject to the Electoral and Labour Courts.

⁴⁵¹ Called '*Forum de Comarca*', in the singular. A '*Comarca*' is a district in the territory of a state and may represent one or more municipalities. They are divided in '*Varas Cíveis*' and '*Varas Criminais*' (Civil and Criminal divisions)

⁴⁵² They are equivalent to an '*Oberlandesgericht*' in Germany and called '*Tribunal de Justiça*', in the singular ('*Court of Justice*', in English). These Courts of Appeals are located in the capitals of every state. They are divided in '*Câmaras*' instead of '*Varas*' in order to differentiate the instance and the work of three judges instead of only one. An example is the *Tribunal de Justiça do Estado do Rio Grande do Sul* (TJ-RS), the Court of Appeals of the State of Rio Grande do Sul, which is located in Porto Alegre. For more details, visit www.tjrs.jus.br. Date of access: 30th April 2010.

⁴⁵³ Federal Regional Courts, in English. They are divided in '*Câmaras*', like the '*Tribunais de Justiça*'.

⁴⁵⁴ The *Tribunal Regional Federal da 2ª Região* (States of Rio de Janeiro and Espírito Santo) and the *Tribunal Regional Federal da 3ª Região* (States of São Paulo and Mato Grosso do Sul).

⁴⁵⁵ The *Tribunal Regional Federal da 1ª Região* (States of Acre, Rondônia, Roraima, Amazonas, Pará, Tocantins, Amapá, Mato Grosso, Goiás, Maranhão, Piauí, Bahia and Minas Gerais).

For both the state and the federal judicial branches, there are two superior courts: the *Superior Tribunal de Justiça* (STJ)⁴⁵⁶ and the *Supremo Tribunal Federal* (STF)⁴⁵⁷. The STF is a Constitutional Court and the Brazilian highest judicial instance, and the STJ⁴⁵⁸ may be defined as the country's highest judicial instance for non-constitutional matters. The specific competencies are regulated by the Brazilian Constitution.

Trade in Brazil is regulated by the Constitution, the Civil Code, the Commercial Code as well as bills and decrees on specific trade issues. Court judges in charge of civil law matters are the ones responsible for trade litigation, but courts are free to create specific benches. Yet, the solution of conflicts through the judiciary is not the only legitimate alternative recognised in Brazil, since there is the possibility for the parties to choose, facultatively, a court of arbitration.⁴⁵⁹

6. The Role of Judges in Brazil

The Roman-Germanic codified legal system that was adopted in Brazil has constitutional principles and procedural guarantees that establish formal proceedings to file suits. The legal relationship of parties in a litigation (*Prozessrechtsverhältnis*, in German) and the role of judges in the current Brazilian Law have their origins in the legal doctrine of *Oskar von Bülow* and his book *Die Lehre von den Prozesseinreden und die Prozess-Voraussetzungen*.⁴⁶⁰ Bülow established the doctrine that the process has the nature of a public law legal relationship with a continuative character, i.e. a means that develops itself over time, differently from being previously established like substantive law, and binds the parties and what he calls the 'State-Judge' together. Based on this principle, he formulated the concept of 'procedural requirements' (*Verfahrensvoraussetzungen* and also *Prozessvoraussetzungen*, in German),⁴⁶¹ and those who followed him forged the early theoretical and

⁴⁵⁶ Superior Court of Justice, in English. Equivalent to the '*Bundesgerichtshof*' in Germany.

⁴⁵⁷ Federal Supreme Court, in English. Equivalent to the '*Bundesverfassungsgericht*' in Germany.

⁴⁵⁸ The STJ is much more recent than the STF, as it was created by the Federal Constitution of 1988 (Art. 105) in order to restructure the STF and eliminate all lawsuits involving infra-constitutional subject matters.

⁴⁵⁹ For details, see the section 'Arbitration' among the Non-State-Owned Means of Dispute Settlement.

⁴⁶⁰ Bülow, Oskar von, *Die Lehre von den Prozesseinreden und die Prozess-Voraussetzungen*, Giessen, 1868.

⁴⁶¹ '*Pressupostos processuais*', in Portuguese.

terminological instruments of today's procedural law. *Bülow* is also considered by a number of authors⁴⁶² as the first legal theorist to draw attention to the creative ability that judges must have when they apply the law.

One of the finalities of the State is the survival of its society. Substantive and procedural laws allow the existence and the development of this society. According to *Teixeira*,⁴⁶³ the foundations of procedural law are to be found in constitutional law, which sets out its main goals, especially regarding the right of action, the right to have an attorney and the exercise of jurisdiction. The constitutional aspect raised by *Teixeira* takes us back to the doctrine of *Hans Kelsen*, since he was the first to use the term 'constitutional procedural law'.⁴⁶⁴ Therefore, the notion of the due process of law was elevated to a 'constitutional due process of law'.⁴⁶⁵

Art. 12 of the Law of Introduction to the Norms of Brazilian Law (Decree-Law Nr. 4,657 of 1942)⁴⁶⁶ defined, for the first time, situations in which the Brazilian judiciary has compulsory and parallel jurisdiction. According to Art. 12, the Brazilian judicial power has the jurisdiction to judge defendants that have their domiciles in Brazil. In addition, the same Article defines that the national judiciary is also competent to judge lawsuits that might generate mandatory injunctions to be performed in Brazil.⁴⁶⁷ Paragraph 1 of Art. 12 establishes that the Brazilian judicial branch has exclusive competence to take cognisance of lawsuits concerning real estate located in the country.⁴⁶⁸ Paragraph 2 determines that, once an exequatur is authorised in accordance to what is established by the Brazilian Law, the national judiciary will

⁴⁶² E.g., Engisch, Karl, *Einführung in das juristische Denken*, 8th ed., Stuttgart, 1983; Heck, Phillipp, *El Problema de la Creación del Derecho* (translated by Manuel Entenza), Granada, 1999; Müller, Friedrich, *Richterrecht, Elemente einer Verfassungstheorie*, Berlin, 1986; and Coing, Helmut, *Grundzüge der Rechtsphilosophie*, 4th ed., Berlin, 1985.

⁴⁶³ Teixeira, Sálvio de Figueiredo, *O Processo Civil na Nova Constituição*, Vitória, 1998, p. 04.

⁴⁶⁴ Kelsen, Hans, *Teoria Pura do Direito*, 6th ed., São Paulo, 1998. The expression in Portuguese that is used in the book is '*Direito Processual Constitucional*'.

⁴⁶⁵ Perhaps a more appropriate expression would be 'due process of constitutional law'.

⁴⁶⁶ Law Nr. 12,376 of 2010 renamed the Law of Introduction to the Brazilian Civil Code and expanded its field of application. Although since 2010 the official name of Decree-Law Nr. 4,657 of 1942 is '*Lei de Introdução às normas do Direito Brasileiro*' ('Law of Introduction to the Norms of Brazilian Law', in English), its content remained the same as that which existed until 2010. This content was expanded and adapted several times between 1942 and 2010.

⁴⁶⁷ Art. 12 of the Law of Introduction to the Brazilian Civil Code: *É competente a autoridade judiciária brasileira, quando for o réu domiciliado no Brasil ou aqui tiver de ser cumprida a obrigação.*

⁴⁶⁸ § 1^o *Só à autoridade judiciária brasileira compete conhecer das ações, relativas a imóveis situados no Brasil.*

comply with the procedures ordered by the letter rogatory of a foreign competent body and will examine the foreign Law in regards to the purposes of the measures.⁴⁶⁹

With the current Code of Civil Procedure (Law Nr. 5,869 of 1973), Articles 88 and 89 began to regulate the issues of Art. 12 of the Law of Introduction to the Norms of Brazilian Law. The texts of Articles 88 and 89 are below:

“Art. 88. The Brazilian Judiciary is competent to judge when:

- I – the defendant, whatever is his nationality, is domiciled in Brazil;
- II – the defendant’s obligation has to be performed in Brazil;
- III – the action originates in a fact that took place in Brazil or an act that was performed in the country.

Sole Paragraph. Concerning item I, a foreign legal person is deemed to be domiciled in Brazil when it has an agency, branch or subsidiary in the country.”⁴⁷⁰

“Art. 89. The Brazilian Judiciary is competent, with the exclusion of any other:

- I – to take cognisance about lawsuits relating to real estates located in Brazil;
- II – to conduct probate process of assets located in Brazil, even if the deceased is a foreigner and has resided outside the country.”⁴⁷¹

Therefore, the Brazilian legislator adopted a criterion for direct determination of the extent of the so-called ‘international jurisdiction of the Brazilian judiciary’.⁴⁷² Thus,

⁴⁶⁹ § 2º A autoridade judiciária brasileira cumprirá, concedido o exequatur e segundo a forma estabelecida pela lei brasileira, as diligências deprecadas por autoridade estrangeira competente, observando a lei desta, quanto ao objeto das diligências.

⁴⁷⁰ Art. 88. É competente a autoridade judiciária brasileira quando:
I - o réu, qualquer que seja a sua nacionalidade, estiver domiciliado no Brasil;
II - no Brasil tiver de ser cumprida a obrigação;
III - a ação se originar de fato ocorrido ou de ato praticado no Brasil.

Parágrafo único. Para o fim do disposto no nº I, reputa-se domiciliada no Brasil a pessoa jurídica estrangeira que aqui tiver agência, filial ou sucursal.

⁴⁷¹ Art. 89. Compete à autoridade judiciária brasileira, com exclusão de qualquer outra:

I - conhecer de ações relativas a imóveis situados no Brasil;
II - proceder a inventário e partilha de bens, situados no Brasil, ainda que o autor da herança seja estrangeiro e tenha residido fora do território nacional.

there are specific elements of connection that may include a dispute in the sphere of examination of national judges. *Marques*⁴⁷³ stresses that the criterion is similar to the ones that exist in the Italian and Portuguese legal systems and different from the legal systems of Germany and Austria, in which the international jurisdiction of courts and judges is indirectly established. For *Liebman*,⁴⁷⁴ norms regarding domestic jurisdiction and indicating national courts as competent also presume the existence of international jurisdiction, because, if one does not do so, the lack of jurisdiction of the national judiciary would be ascertained. But, I believe that the text of Art. 89 also allows us to conclude that this presupposes Brazilian courts' exclusivity and, *a contrario sensu*, everything that is foreseen admits a concurrence of the Brazilian jurisdiction with an eventual foreign jurisdiction (both jurisdictions may become concurrent). For me, this is a much more reasonable interpretation.

The internal jurisdiction of the Brazilian judiciary is governed by Articles 91 to 124 of the Code of Civil Procedure and Articles 92 to 135 of the Federal Constitution.

The initial pleading must be able to initiate the process, go through all proceeding phases (cognisance and execution),⁴⁷⁵ and be valid.⁴⁷⁶ It is the complaint that demonstrates the subject matter, also called '*lide*' in Brazil, which is the grounds of the lawsuit.⁴⁷⁷ Therefore, the complaint must be clear so that the work of the judiciary is performed only once regarding each claim.⁴⁷⁸ Both the mediate and immediate complaints need to be precise and defined in order to have their limits set. Neither a conditional nor a vague complaint is accepted by the Brazilian Civil Procedural Law. A generic complaint, however, is permitted by Art. 286 of the Code of Civil Procedure, which lists the hypotheses that accept it. These hypotheses are universal civil actions for situations in which the author is unable to individualise in the

⁴⁷² Barbi, Celso Agrícola, *Comentários ao Código de Processo Civil*, 9th ed., vol. 1, tome 2, Rio de Janeiro, 1994, p. 240 quoted in Marques, Sergio André Laclau Sarmento, *A jurisdição Internacional dos Tribunais Brasileiros*, Rio de Janeiro, 2007, p. 138.

⁴⁷³ Marques, 2007, p. 139.

⁴⁷⁴ Liebman, Enrico Tullio, *Os Limites da Jurisdição Brasileira*, In: *Revista Forense*, vol. 92, Rio de Janeiro, December 1942, p. 23 quoted in Marques, p. 139.

⁴⁷⁵ Depending on the circumstances of the cases, also an action for provisional remedy or a preliminary injunction.

⁴⁷⁶ Art. 282 of the Code of Civil Procedure specifies the requirements of the complaint.

⁴⁷⁷ '*mérito da ação*', in Brazil. It is known in Germany as '*Begründetheit*'.

⁴⁷⁸ For more details, see Alvim, Arruda, *Manual do Direito Processual Civil*, vol. 1, 6th ed., São Paulo, 1997, p. 409.

claimant what is being demanded,⁴⁷⁹ is not capable of definitively determining the consequences of the unlawful act or fact,⁴⁸⁰ and for cases whose definition of the financial amount to be paid in the conviction depends on an act to be done by the defendant.⁴⁸¹ While the request is considered determined (certain) when it identifies the object of relief, it is generic when it is broad and imprecise in regards to its limits.

The procedure is subject to adversarial proceeding, is an instrument that serves substantive law and has to comply with the due process and rule of law principles. In order to fulfil the constitutional guarantee of adversarial proceeding, all types of litigation in Brazil contain specific stages for each of the parties to plea, provide evidence and allege (*'pedir'*, *'provar'* and *'alegar'*, respectively, in Portuguese) before the judgment – i.e., during the cognisance procedure – and after it – i.e., at a higher court. There are even a few possibilities later on during the execution procedure.

A judicial proceeding, in order to legitimately exist, must have an initial pleading, a lawful judge⁴⁸² with subject-matter jurisdiction (*ratione materiae*) or rather jurisdiction over the person (*ratione personae*), as the case may be, the parties and their attorneys must have *legitimatio ad causam* and *legitimatio ad processum*, respectively, and summons must also be effected. With regard to the parties, there are exceptions, namely unincorporated entities or associations, such as universalities of assets like bankruptcy assets and inheritances,⁴⁸³ and implied partnerships.⁴⁸⁴ These may also be parties. The aims of these exceptions are isonomy and legal certainty in the above-mentioned types of relationships.

Art. 128 of the Code of Civil Procedure also plays an important role in judicial proceedings. According to it, judges decide suits within the limits that they are filed, are forbidden to take account of issues that are not raised by the parties and, thus, only

⁴⁷⁹ Art. 286, I.

⁴⁸⁰ Art. 286, II.

⁴⁸¹ Art. 286, III.

⁴⁸² But, there are 'non-State-owned' means of dispute settlement. For details, consult the specific section of this thesis.

⁴⁸³ Art. 12, III and 12, V of the Code of Civil Procedure, respectively.

⁴⁸⁴ Art. 12, VII of the Code of Civil Procedure.

the parties may take initiatives to provide information to judges.⁴⁸⁵ In addition, Art. 460, which is in the chapter of the Civil Code about the judgment and the *res judicata*, defines that judges are forbidden to grant in a way that is diverse from the plaintiff's requests in the complaint, and cannot sentence the defendant in an amount that is superior or an object that is diverse from the one(s) of the action.⁴⁸⁶

Hence, the legal procedural relationship follows the classical plaintiff-judge-defendant relation, and judges have the obligation to be independent and impartial. On the other hand, they are definitely also subject to rule of law and, accordingly, cannot disregard basic legal norms. So, they may 'create' laws, but these must be in harmony with the state legal system. This brings me to *Zimmermann*, as he underlines that:

“a crucial aspect of judicial independence in Brazil is that judges can decide cases against parliamentary statutes and presidential decrees of questionable constitutionality. In 1990, for instance, the STF overruled Provisional Measure n. 190, as judges found it to be a barely modified version of another measure previously rejected by the National Congress. With the federal legislature out of session, unable to overturn this measure, the STF safeguarded the rule of law by declaring the presidential manoeuvre unconstitutional.”⁴⁸⁷⁻⁴⁸⁸

Zimmermann also points out that the Federal Constitution of 1988 provided judges with “the capacity to strike down any act of questionable legality from both the legislative and the executive branches.”⁴⁸⁹

⁴⁸⁵ Art. 128 – *O juiz decidirá a lide nos limites em que foi proposta, sendo-lhe defeso conhecer de questões não suscitadas, a cujo respeito a lei exige a iniciativa da parte.*

⁴⁸⁶ Art. 460 – *É defeso ao juiz proferir sentença, a favor do autor, de natureza diversa da pedida, bem como condenar o réu em quantidade superior ou em objeto diverso do que lhe foi demandado.*

⁴⁸⁷ Zimmermann, Augusto, *How Brazilian judges undermine the rule of law: a critical appraisal*, In: *International Trade and Business Law Review*, Nr. 11, 2008, p. 46, which can be found at <http://www.profpito.com/ITBLRBrazilianJudiciaryZimmermann.pdf>. Last date of access: 16th February 2014.

⁴⁸⁸ The author applies the expression 'parliamentary statutes' although Brazil has a Congress rather than a Parliament. A possible reason for the inappropriate expression is that the word 'parliamentary' is incorrectly applied in Brazil as a synonym of 'congressional'. Therefore, it is important to clarify that Brazil does not have a parliamentary system with the head of State being one person and the head of government another person. Instead, the President is both the head of State and head of government.

⁴⁸⁹ Zimmermann, p. 47.

On the other hand, there is a serious lack of judges in Brazil, which is the main reason for the backlog and judicial delays.⁴⁹⁰ According to an NGO, while in Germany, for instance, in the year 2000 there was one judge per 3,500 inhabitants, Brazil had one judge per 23,000 inhabitants.⁴⁹¹ Based on the data made available by the same organisation, another problem is that, in some circumstances, up to 80 different appeals along the process can be interposed and cases may have to be judged up to 8 times until the first ruling is confirmed.⁴⁹² According to *Nicholson*,⁴⁹³ in 2011 approximately 26 million cases were started in Brazil. The *Supremo Tribunal Federal* (STF) – which is Brazil’s highest court, works with constitutional issues and is composed of 11 judges – received in 2006, according to the same author, 127,500 new cases. The *Superior Tribunal de Justiça* (STJ) – which is Brazil’s highest court for non-constitutional issues and is composed of 31 judges – has an average of 300,000 new cases per year. The British magazine *The Economist* wrote in May 2009 that the STF “has long been something of a joke” and is “the most overburdened court in the world”.⁴⁹⁴ Joaquim Falcão, dean of a law school in Rio de Janeiro, explained in an interview that there are now “52 ways to get a case into the STF, and all cases claim to be raising constitutional issues.”⁴⁹⁵ According to him, both the government and private parties make use of appeals even if they know that they are going to lose, as it is a way of delaying rulings and trying to run out the clock.⁴⁹⁶ In 2012, due to the ‘*súmulas vinculantes*’, the number of new cases received by the STF went down to 67,000 (I examine the pros and cons of the ‘*súmulas vinculantes*’ in section 5.2. of this chapter).

⁴⁹⁰ Prillaman, William C., *The Judiciary and Democratic Decay in Latin America: Declining Confidence in the Rule of Law*, Westport (Connecticut), Praeger, 2000, p. 93, quoted in Zimmermann, p. 20.

⁴⁹¹ Transparência Brasil, *Report on Brazil presented to the II Global Forum on Fighting Corruption*, The Hague, May 2001, p. 16. The complete paper can be found at <http://www.transparencia.org.br/docs/GFIIReport.pdf>. Transparência Brasil is the Brazilian branch of the international non-governmental organisation Transparency International, which was created in Germany in 1993.

⁴⁹² Transparência Brasil, May 2001, p. 17.

⁴⁹³ Nicholson, Brian, *Brazil’s slow justice too appealing for some*. It is a news article published in the *IBA Global Insight* of April/May 2013 which can be found at the website of the London-based International Bar Association at the address <http://www.ibanet.org/Article/Detail.aspx?ArticleUid=742ab812-7754-495b-b7fd-1299fa7b8f77>. Date of access: 20th February 2014.

⁴⁹⁴ The Economist, *Brazil’s supreme court: when less is more*, to be found at <http://www.economist.com/node/13707663>. Date of access: 20th February 2014.

⁴⁹⁵ Interview given to Brian Nicholson.

⁴⁹⁶ *Ibid.*

Consequently, while on the one hand the glut of cases in Brazilian courts can be seen as good for attorneys, law firms and segments of the public administration, on the other hand it is negative for the Brazilian judiciary and propagates mistrust. Furthermore, corruption among judges has been a historic problem and also contributed to mistrust. *Zimmermann* gives several examples. I selected two of them and transcribed them below. This is the first:

“In 2003, for example, the police found a judge from the Superior Court of Justice (STJ), Brazil’s second-highest court, accepting bribes to give writs of habeas corpus to drug-dealers.”⁴⁹⁷

And this is the second one:

“On the issue of budget, the 1988 Constitution gives the judiciary the power to prepare its own budget. Unfortunately, judges have not administered the judicial funds properly. In 1995, the new building of the STJ (...) was finished at a cost of US\$170 million. Within the building there were far more empty rooms than used ones. The building has an indoor theatre, exercise rooms, two restaurants, a ballroom, a bar, and a swimming pool.”⁴⁹⁸

Marcos da Costa, president of the São Paulo subsection of the Brazilian Bar Association (OAB/SP), argues that the judiciary is slow because it did not grow at the same pace as the demands did.⁴⁹⁹ According to him, in the state of São Paulo there are thousands of vacant judiciary posts.⁵⁰⁰ Moreover, frequent strikes involving the staff of courts in some part of the country also contribute to the general national slowness. Yet, for judge Juliano Stumpf, who has written a Master thesis on the snail’s pace of the Brazilian judiciary, while more money is certainly welcome because the population is growing, the main reasons for the slowness is inefficient management of

⁴⁹⁷ Zimmermann, p. 24. The author also quotes Vargas, Daniela T., *Civil Justice in the Americas: Lessons from Brazil* (2004) 16, in: *Florida Journal of International Law* 19, p. 22.

⁴⁹⁸ Zimmermann, p. 25. The author also quotes Prillaman, William C., *The Judiciary and Democratic Decay in Latin America: Declining Confidence in the Rule of Law*. Westport: Praeger, 2000, p. 88.

⁴⁹⁹ *Ibid.*

⁵⁰⁰ With regard to São Paulo, I consider it important to highlight that this is the most populous state in Brazil and it also generates the most cases.

first and second instance courts, besides a general administrative disorganisation of the Brazilian judiciary.⁵⁰¹

Hence, one can see there is a series of problems – namely, insufficient judges per inhabitants, too many new cases every year, too many types of appeals, procedural tricks to delay rulings, frequent strikes, maladministration of first and second instance courts, and an overall disorganisation of the Brazilian judiciary – that generates different effects, among which the jeopardising of access to justice. In addition, as I have pointed out, corruption among judges has also been a historical problem. Uncovering them nowadays, however, is becoming even more difficult – even though pieces of evidence constantly emerge in the daily work of courts. While the problems are known, there is an avoidance of responsibility among legal professionals, bad faith by many of them in their day-to-day work and a lack of interest to pay serious attention to implement coordinated changes in order to benefit society.

6.1. *Súmulas*

In Brazilian law, a ‘*súmula*’⁵⁰² is a judicial precedent that shows the pacific or majoritarian interpretation adopted by a court on a specific theme. The ‘*súmula*’⁵⁰³ is intended to make a judicial understanding public in society, promote uniformity among court decisions, confer more legal stability to jurisprudence, facilitate the activities of courts and attorneys, and simplify the most common controversies. Established by the Brazilian Federal Supreme Court in 1963 through an amendment to its Internal Regulations,⁵⁰⁴ a ‘*súmula*’, when cited by its number before the Federal Supreme Court, is considered as satisfactory jurisprudence of reference and exempts the examination of other court decisions. In cases in which there is the applicability of a ‘*súmula*’, the judge rapporteur⁵⁰⁵ of the Supreme Court may file or dismiss a request or appellate review that contradicts it. In lower courts, the analysis of ‘*súmulas*’ is essential for harmonious interpretation of federal Law, but, in the name of the

⁵⁰¹ *Ibid.*

⁵⁰² The Portuguese word ‘*súmula*’ comes from the Latin word ‘*summula*’, which means summary, abstract, resume, abridgment of law and judicial precedent.

⁵⁰³ Art. 479 of the Code of Civil Procedure.

⁵⁰⁴ Articles 102 and 103 of its internal regulations.

⁵⁰⁵ ‘*Juiz Relator*’, in Portuguese.

independence and separation of powers, these precedents have no binding effect. The ‘*súmulas vinculantes*’, conversely, do have binding effect.

6.2. *Súmulas Vinculantes*

It is necessary to take a particular perspective in order to analyse what a ‘*súmula vinculante*’ – ‘binding judicial precedent’, in English – is. This is because, when it was created by Constitutional Amendment Nr. 45 of the year 2004, the main arguments of the public administration (Executive and Legislative Powers) focused on the objectives of reducing the number of appellate reviews to higher courts, ensuring fast-track proceedings, clarity and legal certainty, besides seeking the creation of more credibility for the Brazilian judiciary through increased predictability in court decisions concerning similar cases and subject matters. Hence, according to this perspective, which follows legal and political theories, there would be progress in the functioning of courts and also positive consequences for society. Nevertheless, from a perspective that considers the separation of powers, the democratic system, the legal defence and adversary system, rule of law and access to justice, it becomes clear that ‘*súmulas vinculantes*’ represent a retrograde step and a menace.

The issue has generated a great deal of discussion among judges, public prosecutors, attorneys, the Brazilian Bar Association and the population, making the ‘*súmulas vinculantes*’ notorious in the national society.

According to Art. 103-A of the Constitution⁵⁰⁶, the Federal Supreme Court shall have the power to, by its own initiative or due to the invocation of its jurisdiction by a party, by means of a decision taken by two thirds of its members, after reiterated decisions about constitutional matter, approve a precedent which, after publication in the official gazette, shall have binding effect over the other bodies of the judiciary Power and over the direct and indirect public administration, at federal, State and

⁵⁰⁶ Article 103-A was created by the Constitutional Amendment Nr. 45 in 2004.

municipal levels. It may also proceed to their revision or cancelling, in the manner provided for in law.⁵⁰⁷

The binding precedent shall have as subject the validity, the interpretation and the efficacy of specific norms, about which there are actual controversies between the judiciary bodies or between these and the public administration, which cause serious legal uncertainty and relevant multiplication of suits over an identical matter.⁵⁰⁸

Without generating any prejudice to the provisions of law, the approval, revision or cancelling of a binding precedent may be provoked by those parties which are entitled to propose a Direct Action for the Declaration of Unconstitutionality.⁵⁰⁹ Any administrative act or judicial decision which goes against an applicable binding precedent or applies it in an undue manner shall be contested before the Federal Supreme Court, which, in case of granting the contestation, shall nullify the administrative act or revoke the judicial decision and determine its substitution with or without the application of the binding precedent, as the case may require.⁵¹⁰

It is important to point out that the public administration has so much interest in the ‘*súmula vinculante*’ because of its large number of suits and the costs that are related to them. Thus, the existence of binding precedents, instead of developing the Brazilian judiciary with more judges on duty, is in the interest of the federal, state and municipal governments.

⁵⁰⁷ Art. 103-A. O Supremo Tribunal Federal poderá, de ofício ou por provocação, mediante decisão de dois terços dos seus membros, após reiteradas decisões sobre matéria constitucional, aprovar súmula que, a partir de sua publicação na imprensa oficial, terá efeito vinculante em relação aos demais órgãos do Poder Judiciário e à administração pública direta e indireta, nas esferas federal, estadual e municipal, bem como proceder à sua revisão ou cancelamento, na forma estabelecida em lei.

⁵⁰⁸ Art. 103-A, § 1. A súmula terá por objetivo a validade, a interpretação e a eficácia de normas determinadas, acerca das quais haja controvérsia atual entre órgãos judiciários ou entre esses e a administração pública que acarrete grave insegurança jurídica e relevante multiplicação de processos sobre questão idêntica.

⁵⁰⁹ Art. 103-A, § 2. Sem prejuízo do que vier a ser estabelecido em lei, a aprovação, revisão ou cancelamento de súmula poderá ser provocada por aqueles que podem propor a ação direta de inconstitucionalidade.

⁵¹⁰ Art. 103-A, § 3. Do ato administrativo ou decisão judicial que contrariar a súmula aplicável ou que indevidamente a aplicar, caberá reclamação ao Supremo Tribunal Federal que, julgando-a procedente, anulará o ato administrativo ou cassará a decisão judicial reclamada, e determinará que outra seja proferida com ou sem a aplicação da súmula, conforme o caso.

According to the São Paulo subsection of the Brazilian Bar Association (OAB/SP),⁵¹¹ court interpretations expressed by ‘*súmulas*’ change over time in view of social changes in the country, new cases with different arguments, new doctrines and even modifications in the composition of the courts themselves. The OAB/SP, therefore, believes that ‘*súmulas vinculantes*’ are the same as closing the doors of the courts to modernity and the changes demanded by the society, plastering over and fossilising legal interpretation and going against social development.

It is important to emphasise that the American *stare decisis* and the ‘*súmula vinculante*’ are not the same. In the system of the United States, the precedents of the U.S. Supreme Court must be respected, but this does not prevent judges from examining the particularities of each case and the various precedents that parties usually claim for their own benefit. Accordingly, judges are free to accept any of the precedents invoked, to refer to another one that was not mentioned or even decide in a way that is different from all precedents indicated, all of which, of course, depends on the peculiarities of the cases. So, there is a much greater degree of flexibility than in a text that has been written by the Brazilian Federal Supreme Court and ironically seems to be like a norm of the Legislative Power. In other words, the Federal Supreme Court gets the power to legislate, which unquestionably interferes with the jurisdiction of the Legislative Power. This, in turn, should make us think about the constitutional aspect of the separation of powers, the democratic system, rule of law, the fundamental right to legal defence and the human right of access to justice.

I agree with *Gonzalez*⁵¹² when he says that legal discretion may vary from judge to judge due to their probable different interpretations of the law and evidence, and, as a result, their ability to perceive what is justice for everyone. Also, judges have different social backgrounds and living experiences, which makes them pluralistic. So, given that democratic societies are pluralistic, I believe that judges have to be pluralistic, as well.

⁵¹¹ The association issued an official statement on the *súmulas vinculantes* which was published in São Paulo’s most important newspapers. To read the entire official text, visit www.oabsp.org.br/noticias/2004/03/18/2317/. Date of access: 7th March 2011.

⁵¹² Gonzales, Carmen, *A propósito das súmulas vinculantes*, in: *Revista da Associação Nacional dos Magistrados do Trabalho*, Year 9, Nr. 31, Brasília, April-June 1997, pp. 22-23, quoted in Paroski, p. 321.

It is also important to bear in mind that litigants, in judicial or administrative processes, as well as defendants in general, are ensured of the adversary system and of full defence, with the means and resources inherent to it.⁵¹³ This way, access to justice is possible. A binding precedent, in contrast, represents an obstacle to it.

Araújo argues, furthermore, that no other court in the world judges so many cases as the Brazilian Federal Supreme Court.⁵¹⁴⁻⁵¹⁵ He also doubts that there is another country with an appellate system that is as flexible as the Brazilian one. According to the same author, 50% of the pending appeals at the higher national courts (STJ and STF) are from the State (the State as appellant). And, if one calculates the cases in which the State (at federal, State and municipal levels) is plaintiff plus those in which it is defendant, “no less than 70% of all cases decided by the higher courts”⁵¹⁶ involve the State. This makes the State what *Araújo* defines “the undisputed champion of judicial delays”.⁵¹⁷⁻⁵¹⁸

All these aspects make it very clear that the Brazilian judicial system needs urgent reform in order to become more dynamic and efficient. Procedural delays, high numbers of public administration disputes, scarcity of courts, deficiency of servants and judges, and the excessive opportunities that parties have to appeal decisions must be combated. The ‘*súmula vinculante*’, however, presents itself as an inappropriate means for this task, for the reason that it is not capable of executing and achieving the rights, guarantees and values established by the Federal Constitution and the Universal Declaration of Human Rights.⁵¹⁹ Furthermore, the ‘*súmula vinculante*’ is

⁵¹³ Art. 5, LV of the Brazilian Constitution: “aos litigantes, em processo judicial ou administrativo, e aos acusados em geral são assegurados o contraditório e ampla defesa, com os meios e recursos a ela inerentes.”

⁵¹⁴ For more details, see Araújo, Francisco Rossal de, *O efeito vinculante das súmulas: um perigo para a democracia?*, In: *Revista da Associação Nacional dos Magistrados do Trabalho*, Year 8, Nr. 26, Brasília, April-May 1996, p. 43, quoted in Paroski, p. 322.

⁵¹⁵ The same was reported by *The Economist* in May 2009. For details: <http://www.economist.com/node/13707663>.

⁵¹⁶ Zimmermann, p. 44.

⁵¹⁷ Paroski, p. 322.

⁵¹⁸ In 1998, it took on average 1,500 days for the Brazilian courts to resolve a single case (Pinheiro, Paulo S., *The (Un)Rule of Law and the Underprivileged in Latin America: New Democracies, Uncivil Societies and Non-Access to Justice* (Paper on file with the author), quoted in Ballard, Megan J., *The Clash Between Local Courts and Global Economics: The Politics of Judicial Reform in Brazil*, In: *Berkeley Journal of International Law*, Vol. 17 (1999), Nr. 2, p. 251).

⁵¹⁹ An interesting comparison between law and mathematics, which is attributed to *Rudolf von Jhering*, applies very well with regard to the Brazilian binding precedents. *Jhering* is supposed to have argued that “one cannot transform jurisprudence into mathematics of law, because life does not exist because

not the appropriate response to provide access to justice. Law needs to follow the social and economic changes of a country – besides, of course, its scientific and technological developments – because all these have a direct influence on society and create new contexts, needs, challenges and conflicts.

7. Alternative Dispute Settlement Procedures (Non-State-Owned)

The Brazilian judiciary has always been slow and inefficient. This is also reflected in judicial proceedings. In addition, the procedural slowness often results in the abandonment of the case by the parties or the acceptance of an agreement that does not meet their real needs, but finally ends an emotionally tiring litigation that has dragged on for years. Nonetheless, there are alternative means that are non-State-owned to settle disputes in Brazil, namely arbitration,⁵²⁰ mediation⁵²¹ and private settlement.⁵²²⁻⁵²³

7.1. Arbitration

Compared to the judicial relief provided by the State, the main positive characteristics of arbitration are speed, informality of procedure, specialisation, confidentiality and flexibility. *Dinamarco*⁵²⁴ has a different analysis. He defines arbitration as timely (based on the sum of the simplification of forms and the kind of procedure), adequate (because of the possibility of having more than one arbitrator with specific knowledge in a particular legal field) and effective (due to its lower cost and not being subject to appeals).

of concepts, but concepts exist because of life.” The original expression is “*Man könnte die Jurisprudenz nicht in eine Mathematik des Rechts umdeuten. Denn: Das Leben ist nicht der Begriffe, sondern die Begriffe sind des Lebens wegen da*” (Newspaper article, ‘*Die doppelt verkaufte Ladung Koks*’, In: *Frankfurter Allgemeine Zeitung*, Geisteswissenschaften, 17. Februar 2010, p. 3.)

⁵²⁰ ‘*Arbitragem*’, in Portuguese.

⁵²¹ ‘*Mediação*’, in Portuguese.

⁵²² ‘*Conciliação*’, in Portuguese.

⁵²³ Unfortunately, there are only a few Law Schools that offer classes concerning these alternatives.

⁵²⁴ Dinamarco, Cândido Rangel, *A nova era do processo civil*, São Paulo, 2003, p. 32.

Arbitration is regulated by law Nr. 9,307 of 1996, is facultative to people who are eligible to enter into a contract, and serves for disputes relating to alienable and waivable property rights.⁵²⁵ In terms of international trade, § 2 of Art. 2 has to be highlighted because it says that “parties may agree to base the arbitration on general principles of law, on custom and usage, and rules of international trade.”⁵²⁶ But, earlier, in 1995, arbitration was also defined by the law relating to small civil and criminal claims courts (law Nr. 9,099 of 1995)⁵²⁷ as an alternative means of dispute settlement if there is no conciliation between the parties.⁵²⁸

Therefore, in both circumstances cited above, arbitration is an optional means and does not disrespect Art. 5, XXXV of the Constitution, which states that “the law shall not exclude any injury or threat to a right from the consideration of the Judicial Power”.⁵²⁹

⁵²⁵ Art. 1º. As pessoas capazes de contratar poderão valer-se da arbitragem para dirimir litígios relativos a direitos patrimoniais disponíveis.

Art. 2º. A arbitragem poderá ser de direito ou de equidade, a critério das partes.

§ 1º Poderão as partes escolher, livremente, as regras de direito que serão aplicadas na arbitragem, desde que não haja violação aos bons costumes e à ordem pública.

§ 2º Poderão, também, as partes convencionar que a arbitragem se realize com base nos princípios gerais de direito, nos usos e costumes e nas regras internacionais de comércio.

⁵²⁶ Art. 2º. A arbitragem poderá ser de direito ou de equidade, a critério das partes.

(...)

§ 2º Poderão, também, as partes convencionar que a arbitragem se realize com base nos princípios gerais de direito, nos usos e costumes e nas regras internacionais de comércio.

⁵²⁷ The *Juizado Especial Cível* – JEC for civil claims of small economic values, namely with values of matter in dispute of up to 40 times the national minimum salary, and the *Juizado Especial Criminal* – JECrim for criminal cases with lower offensive potential, which are specified by law Nr. 9,099/1995. Some authors argue that these courts follow some of the findings of *Cappelletti* – i.e., legal and judicial assistance for needy individuals, the protection of diffuse interests and the informalisation of dispute settlement procedures. This is the case of Fernando de Castro Fontainha in his book *Acesso à Justiça: Da Contribuição de Mauro Cappelletti à Realidade Brasileira*, Rio de Janeiro, Editora Lumen Juris, 2009, p. xvii.

⁵²⁸ Art. 3º. O Juizado Especial Cível tem competência para conciliação, processo e julgamento das causas cíveis de menor complexidade, assim consideradas:

(...)

§ 3º A opção pelo procedimento previsto nesta Lei importará em renúncia ao crédito excedente ao limite estabelecido neste artigo, excetuada a hipótese de conciliação.

Art. 21. Aberta a sessão, o Juiz togado ou leigo esclarecerá as partes presentes sobre as vantagens da conciliação, mostrando-lhes os riscos e as conseqüências do litígio, especialmente quanto ao disposto no § 3º do art. 3º desta Lei.

Art. 22. A conciliação será conduzida pelo Juiz togado ou leigo ou por conciliador sob sua orientação.

⁵²⁹ Art. 5, XXXV - a lei não excluirá da apreciação do Poder Judiciário lesão ou ameaça a direito.

Arbitration decisions are usually not appealable⁵³⁰, as the main purposes of arbitration decisions are quick and inexpensive decisions to end litigations. The substance of the arbitration award⁵³¹ in the Brazilian system does not allow for filing an objection to the decision with an appeal. Arbitration has no State control and is final. The final character of the arbitrators' pronouncements is a consequence of the litigants' free exercise of autonomy of will, which is manifested when they opt for this alternative way to settle disputes.⁵³² But, law 9,307 allows the parties to stipulate, through an 'arbitration clause', the possibility to appeal to the judiciary if they diverge from the arbitration award.⁵³³ In other words, the arbitration clause respects Art. 5, XXXV of the Constitution and, as a result, does not make the text of law 9,307 unconstitutional.

When parties opt for a small civil claims court or a small criminal claims court, the arbitrator has to be one of the lay judges of the court. Outside a small claims court, the arbitrator can be any competent person with the parties' trust.⁵³⁴ In fact, it can be one or more arbitrators, but always present at an odd number, and parties may also appoint the respective substitutes.⁵³⁵ If the parties appoint an even number of arbitrators, these are allowed to immediately appoint another one. If there is no agreement regarding the extra arbitrator, parties shall request the judiciary to make the selection.⁵³⁶

⁵³⁰ Art. 18 of Law 9,307/1996: (...) *a sentença que proferir não fica sujeita a recurso ou a homologação pelo Poder Judiciário.*

⁵³¹ It is similar to the justification of a complaint in a court case.

⁵³² Dinamarco, Cândido Rangel, *no information regarding publication and page*, quoted in Paroski, p. 307.

⁵³³ Art. 3º. *As partes interessadas podem submeter a solução de seus litígios ao juízo arbitral mediante convenção de arbitragem, assim entendida a cláusula compromissória e o compromisso arbitral.*

Art. 4º. *A cláusula compromissória é a convenção através da qual as partes em um contrato comprometem-se a submeter à arbitragem os litígios que possam vir a surgir, relativamente a tal contrato.*

§ 1º. *A cláusula compromissória deve ser estipulada por escrito, podendo estar inserta no próprio contrato ou em documento apartado que a ele se refira.*

§ 2º. *Nos contratos de adesão, a cláusula compromissória só terá eficácia se o aderente tomar a iniciativa de instituir a arbitragem ou concordar, expressamente, com a sua instituição, desde que por escrito em documento anexo ou em negrito, com a assinatura ou visto especialmente para essa cláusula.*

Art. 5º. *Reportando-se as partes, na cláusula compromissória, às regras de algum órgão arbitral institucional ou entidade especializada, a arbitragem será instituída e processada de acordo com tais regras, podendo, igualmente, as partes estabelecer na própria cláusula, ou em outro documento, a forma convencionada para a instituição da arbitragem.*

⁵³⁴ Art. 13 of Law 9,307/1996.

⁵³⁵ Art. 13, § 1 of Law 9,307/1996.

⁵³⁶ Art. 13, § 2 of Law 9,307/1996.

While on the one hand it is evident that arbitration in Brazil can expedite solutions when there is no public interest directly involved, on the other hand parts of the society argue that it can weaken the judicial institution and rule of law.⁵³⁷

At the international level, the conditions for the existence of an arbitral decision are basically the submission to arbitration or arbitral submission; the court of arbitration and the arbitral procedure. According to *Guerreiro*,⁵³⁸ the submission to arbitration establishes arbitration with the dispute to be settled. Of course, the commitment institutes arbitration only in current, contemporary, known and, therefore, concrete cases. An arbitral submission is an agreement between parties to a particular contract in order to resolve, through arbitration, divergences that may occur between them relating to the contract. And, finally, the arbitration organ (or arbitrators) plus the arbitral procedure shall be determined by the arbitral submission or the arbitral body elected by the parties.

In terms of private international law, the freedom of parties to choose the means to settle the dispute is reflected in the possibility to opt for arbitration, i.e. by signing an arbitral submission (also known as arbitration clause), in which parties describe the dispute, limit the applicable rules, elect the arbitrator(s) or arbitral tribunal, set time limits and rules of procedure and, finally, bind themselves to comply with the judgement. Differently from the WTO, which has an appellate body, the decision of the arbitrator in a case involving private parties is final, unappealable and binding, as it is not inserted in a judicial structure.

There are numerous texts that can be applied in international arbitration, like the Geneva Protocol of 1923, the New York Convention of 1958, the Panama Convention of 1975, besides, of course, the UNCITRAL Model Law on International Commercial Arbitration adopted by the United Nations Commission on International Trade Law.

For the solution of conflicts at MERCOSUR level, State jurisdiction has proven to be inadequate, especially because it involves the problematic issue of sovereignty among

⁵³⁷ Transparência Brasil, May 2001, p. 17.

⁵³⁸ Guerreiro, José Alexandre Tavares, *Fundamentos da arbitragem do comércio internacional*, São Paulo, 1993, p. 51.

States and their respective jurisdictions.⁵³⁹ Garro⁵⁴⁰ stresses that arbitration was adopted as the method of resolving disputes between Member States in regional economic blocs like NAFTA and MERCOSUR. Moreover, this type of arbitration of the Public Law sphere is accompanied by the encouragement to also use arbitration to settle disputes between residents of the areas of regional integration. Thus, this type of arbitration, due to its nature and methodology, presented itself as the procedure to resolve disputes related to the MERCOSUR and was standardised in the MERCOSUR Agreement on International Commercial Arbitration, which was written especially to create such a procedure at MERCOSUR level. Pucci⁵⁴¹ highlights that the four domestic legal regimes of the MERCOSUR countries agreed to authorise the following varieties of disputes with reference to arbitration: those controversies that have waivable rights of private parties and proprietary character as their object, that do not affect public order and are susceptible to settlement.

In addition to the Asunción Treaty and the MERCOSUR Agreement on International Commercial Arbitration, the Protocol of Las Leñas and the Protocol of Buenos Aires were designed to indicate strategies for resolving conflicts between private parties. While the Protocol of Las Leñas is about rules of cooperation and judicial assistance in civil, commercial, labour and administrative laws, the Protocol of Buenos Aires is about international *inter partes* proceedings concerning contracts with civil or commercial content executed by private parties.

At the WTO, as already noted above, arbitration and the organisation's dispute settlement system are open only to States and customs territories. So, it cannot be compared to arbitration between private parties in Brazil and in the MERCOSUR. As a result, it can only be contrasted with the dispute settlement system of the MERCOSUR for conflicts involving its Member States, which are regulated by the Protocols of Brasília, Olivos and Ouro Preto. The chapter about the MERCOSUR will present, among others, the relation between MERCOSUR Law and WTO Law plus a

⁵³⁹ For more details, see Amaral, Antonio C. R., *Arbitragem no Brasil e no Âmbito do Comércio Internacional*, available at <http://www.hottopos.com/harvard4/ton.htm>. Date of access: 26th August 2011.

⁵⁴⁰ Garro, Alejandro Miguel, *International Commercial Arbitration in Latin America: Recent Law Reforms*, In: OAB/SC, *Direito Comercial Internacional: Arbitragem*, Florianópolis, 2002, pp. 30-31.

⁵⁴¹ Pucci, Adriana Noemi (Brazilian Federal Senate), *A Arbitragem nos Países do Mercosul*, Brasília, 1996, p. 8.

comparison between both dispute settlement systems and, as a result, the issue of access to justice.

7.2. Mediation

Through mediation, parties have the opportunity to find a peaceful resolution to their conflicts, namely by following their own interests and, thus, establishing a just and fair order. Accordingly, mediation assists the judiciary to achieve the common goal of promoting access to justice. However, in contrast to arbitration, there is no statutory provision in Brazil concerning mediation as a means of resolving conflicts.⁵⁴²

The mediator does not impose a solution to the conflict. His/her role is to promote a friendly dialogue, helping the parties to reach an agreement that satisfies both and fostering the creation of a new reality out of the ongoing relationship.⁵⁴³ The person who plays the role of mediator facilitates the meeting of the parties, a respectful debate and a consensus on the most appropriate solution to be adopted. The mediator is a facilitator of dialogue. He has to act independently and impartially, and must have experience in relation to the role. What derives from this procedure is the promotion of peace and the encouragement to enforce positive active citizenship, which are some of the prerequisites of a *Rechtsstaat*.

7.3. Private Settlement

Private settlement may be in court (Judicial) or out-of-court (Extrajudicial).

In court, private settlement may occur after the filing of action and before judicial inquiry, or even after this stage, but necessarily before the rendition of judgment. During these opportunities, the contribution of attorneys is highly important and

⁵⁴² The only exceptions are the individual and collective bargaining, in the labour legislation.

⁵⁴³ For more details, see Sales, Lília Maia de Moraes/Vasconcelos, Mônica Carvalho, *Mediação familiar, um estudo histórico-social das relações de conflitos nas famílias contemporâneas*, Fortaleza, 2006, p. 72.

judges act as conciliators. According to Art. 125, II and IV of the Code of Civil Procedure,⁵⁴⁴ judges must “ensure the rapid resolution of disputes” and “try, at any time, to conciliate the parties”, respectively. It is an obligation on both the ordinary proceeding and summary proceedings, in which there are slight differences. This obligation does not apply to cases in which rights do not admit transactions or when the circumstances of the case show that conciliation is improbable, “a situation in which the judge may perform curative acts and order the production of evidence”.⁵⁴⁵

The importance of private settlement can also be identified in Articles 447⁵⁴⁶, 448⁵⁴⁷ and 449⁵⁴⁸ of the Brazilian Code of Civil Procedure. They require judges to attempt the conciliation of the parties before introducing oral evidence. Articles 21 to 26 of law 9,099, which regulates the functioning of small civil and criminal claims courts, also determine that judges have to clarify to the parties the advantages of conciliation and private settlement, besides the possible consequences if they decide to proceed with the lawsuit.⁵⁴⁹ Art. 764, § 1 of the Consolidation of Labour Laws also has a

⁵⁴⁴ Art. 125. O juiz dirigirá o processo conforme as disposições deste Código, competindo-lhe:

(...)

II - velar pela rápida solução do litígio;

(...)

IV - tentar, a qualquer tempo, conciliar as partes.

⁵⁴⁵ Paroski, p. 316.

⁵⁴⁶ Art. 447. Quando o litígio versar sobre direitos patrimoniais de caráter privado, o juiz, de ofício, determinará o comparecimento das partes ao início da audiência de instrução e julgamento.

Parágrafo único. Em causas relativas à família, terá lugar igualmente a conciliação, nos casos e para os fins em que a lei consente a transação.

⁵⁴⁷ Art. 448. Antes de iniciar a instrução, o juiz tentará conciliar as partes. Chegando a acordo, o juiz mandará tomá-lo por termo.

⁵⁴⁸ Art. 449. O termo de conciliação, assinado pelas partes e homologado pelo juiz, terá valor de sentença.

⁵⁴⁹ Art. 21. Aberta a sessão, o Juiz togado ou leigo esclarecerá as partes presentes sobre as vantagens da conciliação, mostrando-lhes os riscos e as conseqüências do litígio, especialmente quanto ao disposto no § 3º do art. 3º desta Lei.

Art. 22. A conciliação será conduzida pelo Juiz togado ou leigo ou por conciliador sob sua orientação.

Parágrafo único. Obtida a conciliação, esta será reduzida a escrito e homologada pelo Juiz togado, mediante sentença com eficácia de título executivo.

Art. 23. Não comparecendo o demandado, o Juiz togado proferirá sentença.

Art. 24. Não obtida a conciliação, as partes poderão optar, de comum acordo, pelo juízo arbitral, na forma prevista nesta Lei.

§ 1º O juízo arbitral considerar-se-á instaurado, independentemente de termo de compromisso, com a escolha do árbitro pelas partes. Se este não estiver presente, o Juiz convocá-lo-á e designará, de imediato, a data para a audiência de instrução.

§ 2º O árbitro será escolhido dentre os juízes leigos.

Art. 25. O árbitro conduzirá o processo com os mesmos critérios do Juiz, na forma dos arts. 5º e 6º desta Lei, podendo decidir por equidade.

Art. 26. Ao término da instrução, ou nos cinco dias subseqüentes, o árbitro apresentará o laudo ao Juiz togado para homologação por sentença irrecorrível.

similar text.⁵⁵⁰ The parties may also meet privately in order to reach a consensus on the matter of the dispute. In this case, if there is a private settlement, this should be submitted to the court by a petition for judicial ratification and, consequently, legal security for the litigants.

In disputes involving private property rights, there is the possibility of a transaction⁵⁵¹ in order to avoid the disputes or end them out of court (extrajudicially). The transaction is governed by Articles 840 to 850 of the Brazilian Civil Code⁵⁵² and may be interpreted as a private settlement. *Diniz*⁵⁵³ defines it as a bilateral legal transaction by which interested parties, by making mutual concessions, prevent or extinguish obligations that are doubtful or in dispute. As a result, Brazilian arbitration has

⁵⁵⁰ Art. 764. *Os dissídios individuais ou coletivos submetidos à apreciação da Justiça do Trabalho serão sempre sujeitos à conciliação.*

§ 1º - *Para os efeitos deste artigo, os juízes e Tribunais do Trabalho empregarão sempre os seus bons ofícios e persuasão no sentido de uma solução conciliatória dos conflitos.*

⁵⁵¹ 'Transação', in Portuguese.

⁵⁵² Art. 840. *É lícito aos interessados prevenirem ou terminarem o litígio mediante concessões mútuas.*

Art. 841. *Só quanto a direitos patrimoniais de caráter privado se permite a transação.*

Art. 842. *A transação far-se-á por escritura pública, nas obrigações em que a lei o exige, ou por instrumento particular, nas em que ela o admite; se recair sobre direitos contestados em juízo, será feita por escritura pública, ou por termo nos autos, assinado pelos transigentes e homologado pelo juiz.*

Art. 843. *A transação interpreta-se restritivamente, e por ela não se transmitem, apenas se declaram ou reconhecem direitos.*

Art. 844. *A transação não aproveita, nem prejudica senão aos que nela intervierem, ainda que diga respeito a coisa indivisível.*

§ 1º *Se for concluída entre o credor e o devedor, desobrigará o fiador.*

§ 2º *Se entre um dos credores solidários e o devedor, extingue a obrigação deste para com os outros credores.*

§ 3º *Se entre um dos devedores solidários e seu credor, extingue a dívida em relação aos co-devedores.*

Art. 845. *Dada a evicção da coisa renunciada por um dos transigentes, ou por ele transferida à outra parte, não revive a obrigação extinta pela transação; mas ao evicto cabe o direito de reclamar perdas e danos.*

Parágrafo único. *Se um dos transigentes adquirir, depois da transação, novo direito sobre a coisa renunciada ou transferida, a transação feita não o inibirá de exercê-lo.*

Art. 846. *A transação concernente a obrigações resultantes de delito não extingue a ação penal pública.*

Art. 847. *É admissível, na transação, a pena convencional.*

Art. 848. *Sendo nula qualquer das cláusulas da transação, nula será esta.*

Parágrafo único. *Quando a transação versar sobre diversos direitos contestados, independentes entre si, o fato de não prevalecer em relação a um não prejudicará os demais.*

Art. 849. *A transação só se anula por dolo, coação, ou erro essencial quanto à pessoa ou coisa controversa.*

Parágrafo único. *A transação não se anula por erro de direito a respeito das questões que foram objeto de controvérsia entre as partes.*

Art. 850. *É nula a transação a respeito do litígio decidido por sentença passada em julgado, se dela não tinha ciência algum dos transatores, ou quando, por título posteriormente descoberto, se verificar que nenhum deles tinha direito sobre o objeto da transação.*

⁵⁵³ *Diniz, Maria Helena, Código Civil Anotado, 8ª ed., São Paulo, 2002, p. 499 quoted in Paroski, p. 317.*

another aim, as it was established with the objective of conciliation. Unlike trial at court, arbitration does not necessarily declare a winning and a losing party.

Thus, private settlement is a way of solving conflicts in the Brazilian legal system. The solution might be achieved in court or out-of-court, directly by the parties or with the assistance of third parties, and be formalised by the instruments available in national law, which are a notarially recorded instrument (public deed) or private instrument (in the case of a transaction) and reduced to writing in the record (if there is a suit pending before a court). Solutions achieved out-of-court need judicial ratification if there is a suit before a court.

8. National and Foreign Trade Regulation

The aim of this section is to analyse the main legal aspects of the Brazilian system of foreign trade and trade defence. Put in other words, this section examines the legal basis of Brazil's national and foreign trade regulation, presents the institutions in charge of it, the levels of regulation and the core values to be protected and promoted. This background is important in order to understand how the Brazilian government works with regard to national and foreign trade matters. In order to achieve this goal, the analysis follows a normative and historical descriptive methodology. Given their importance, foreign trade and trade defence in Brazil will be examined separately.⁵⁵⁴

Processes of integration among countries exist in virtually every continent, and there are several economic blocs. With some differences in their forms, they all have two goals in common: economic growth and the expansion of trade flows. Every country depends on the exchange of trade activities in order to meet its domestic needs.

8.1. Foreign Trade

⁵⁵⁴ The source of the information for the following subsections is an official website of the Brazilian government which has up-to-date information. The original text in Portuguese may be found at <http://www.mdic.gov.br/sitio/interna/interna.php?area=5&menu=228>. Page accessed on 20th November 2013.

The main body of the Brazilian government for its international trade relations is the ‘*Secretaria de Comércio Exterior* – SECEX’ (‘Secretariat of Foreign Trade’, in English) of the ‘*Ministério do Desenvolvimento, Indústria e Comércio Exterior* – MDIC’ (‘Ministry of Development, Industry and Foreign Trade’, in English). This secretariat operates in four basic segments, namely: (1) foreign trade operations, (2) international negotiations, (3) planning and development of foreign trade, and (4) trade defence. To do so, the secretariat is structured in the following organs: (a) ‘*Departamento de Operações de Comércio Exterior* – DECEX’ (‘Department of Foreign Trade Operations’), (b) ‘*Departamento de Negociações Internacionais* – DEINT’ (‘Department of International Negotiations’) and (c) ‘*Departamento de Planejamento e Desenvolvimento do Comércio Exterior* – DEPLA’ (‘Department of Planning and Development of Foreign Trade’). These organs will be examined next.

a. Department of Foreign Trade Operations – DECEX

The DECEX⁵⁵⁵ regulates foreign trade operations and its main aim is expanding Brazilian exports to a level that is consistent with the potential of the country. Thus, efforts to improve Brazilian foreign trade mechanisms are implemented in association with a public policy that is supposed to generate sustainable and rational economic development.⁵⁵⁶ The DECEX is an organ that is subordinated to the Secretariat of Foreign Trade (SECEX), as explained above, and is expected to simplify the operability of Brazilian foreign trade, promoting exports and providing to the national community instruments that will help its integration into the international market. In order to achieve these objectives, the DECEX can regulate operational procedures, administer the Integrated System of Foreign Trade (SISCOMEX),⁵⁵⁷ analyse and authorise export and import operations, formulate strategies for the development of Brazilian foreign trade, disseminate information of the sector and monitor the trade of products. The DECEX also monitors the day-to-day exports and imports, issues licenses, regulates procedures, and collects information and statistical data. This

⁵⁵⁵ ‘*Departamento de Operações de Comércio Exterior*’, in Portuguese. It is also known as DECEX.

⁵⁵⁶ ‘Sustainable Development’ is a public objective for achieving a development that fulfills certain obligations that respect public goods. There is, however, no definition for it in international law.

⁵⁵⁷ ‘*Sistema Integrado de Comércio Exterior*’, in Portuguese. Also known as SISCOMEX.

department is also one of the three organs responsible for the administration of the SISCOMEX.

b. Department of International Negotiations – DEINT

The DEINT⁵⁵⁸ was created to regulate the international negotiations of which Brazil participates and to safeguard the country's interests. Its main responsibilities are negotiating and promoting studies and initiatives designed to support, inform and guide Brazilian participation in foreign trade negotiations. At the national level, it is expected to coordinate the preparatory work of the Brazilian participation in tariff negotiations and decide on the extension and withdrawal of concessions. All the DEINT competencies are listed in Art. 17 of Decree 7,096 of 2010.⁵⁵⁹

c. Department of Planning and Development of Foreign Trade – DEPLA

⁵⁵⁸ 'Departamento de Negociações Internacionais', in Portuguese. It is also known as DEINT.

⁵⁵⁹ Art. 17. Ao Departamento de Negociações Internacionais (DEINT) compete:

I - participar das negociações de tratados internacionais de comércio de bens e serviços, em coordenação com outros órgãos governamentais, nos âmbitos multilateral, hemisférico, regional e bilateral;

II - promover estudos e iniciativas internas destinados ao apoio, informação e orientação da participação brasileira em negociações internacionais relativas ao comércio exterior;

III - desenvolver atividades relacionadas ao comércio exterior e participar das negociações junto a organismos internacionais;

IV - coordenar, no âmbito da Secretaria, os trabalhos de preparação da participação brasileira nas negociações tarifárias e não-tarifárias em acordos internacionais e opinar sobre a extensão e retirada de concessões;

V - participar e apoiar as negociações internacionais relacionadas a bens e serviços, meio ambiente relacionado ao comércio, compras governamentais, política de concorrência relacionada ao comércio, comércio eletrônico, regime de origem, barreiras não-tarifárias e solução de controvérsias;

VI - coordenar a participação do Brasil nas negociações internacionais referentes a regimes de origem preferenciais e os procedimentos relacionados a estes, bem como no Comitê de Regras de Origem da Organização Mundial do Comércio - OMC, acompanhando as negociações do Comitê Técnico de Regras de Origem da Organização Mundial das Aduanas - OMA e prestando auxílio aos setores interessados;

VII - administrar, no Brasil, o Sistema Geral de Preferências - SGP e o Sistema Global de Preferências Comerciais - SGPC, bem como os regulamentos de origem dos acordos comerciais firmados pelo Brasil e dos sistemas preferenciais autônomos concedidos ao Brasil;

VIII - coordenar, internamente, os Comitês Técnicos nº 01, de Tarifas, Nomenclatura e Classificação de Mercadorias, e nº 03, de Normas e Disciplinas Comerciais, da Comissão de Comércio do Mercosul - CCM;

IX - estudar e propor alterações na Tarifa Externa Comum - TEC e na Nomenclatura Comum do Mercosul - NCM; e

X - promover articulação com órgãos do governo e do setor privado, com vistas a compatibilizar as negociações internacionais para o desenvolvimento do comércio exterior brasileiro.

The main competencies of the Department of Planning and Development of Foreign Trade⁵⁶⁰ can be summarised as follows:

- proposing and supervising the implementation of foreign trade policies and programmes;
- formulating proposals and plans of government action in the field of foreign trade;
- developing studies on strategic markets and goods for expanding Brazilian exports;
- planning and executing foreign trade training programmes targeted at small and medium enterprises;
- planning the implementation and maintenance of programmes for the development of an 'export culture';
- following, in international forums and committees, issues related to the development of international trade and e-commerce;
- writing and publishing technical material to guide exporting activities;
- producing, analysing, systematising and disseminating statistical data concerning foreign trade;
- formulating strategies for partnerships between public and private entities for the development of actions and programmes related to the promotion of exports;
- participating in committees and national and international forums related to the promotion of exports;
- coordinating actions of development and implementation of the programme 'state exporter';
- coordinating activities, implementing actions and providing information on foreign trade.

8.2. Trade Defence

⁵⁶⁰ '*Departamento de Planejamento e Desenvolvimento do Comércio Exterior*', in Portuguese. It is also known as DEPLA.

Brazil became a signatory to the GATT anti-dumping and subsidies and countervailing measures codes in April 1979 at the end of the Tokyo Round, but these agreements only became an integral part of Brazilian national law in 1987 through decree Nr. 93,941 of 19th January 1987 and decree Nr. 93,962 of 23rd January 1987, both published in the official Brazilian Gazette of 2nd February 1987 and approved by the National Congress on 5th December 1986 through legislative decree Nr. 20.⁵⁶¹ Rules that were previously in force as well as the administrative procedures related to them were in conflict with GATT rules and became, with its increasing use, continuously overwhelming for Brazil in international forums. The implementation of these ‘codes’ in Brazil has been delayed because other trade protection mechanisms, such as many special provisions and strict administrative controls on imports, were in force in the country. Accordingly, national production was only relatively protected from unfair trade practices. In 1987, with the approval of the ‘Tokyo Round codes’, Brazil started to have trade policy instruments which the international community has proven to be more appropriate to protect domestic industry against unfair trade practices. It was then determined that the former Commission on Customs Policy (CPA)⁵⁶² of the Ministry of Finance should be in charge of the coordination of investigations and the application of anti-dumping and countervailing measures. The use of these mechanisms by the Brazilian national industry, however, became more effective only from the early 1990s onwards with trade liberalisation and the elimination of several administrative controls, the eradication of many special arrangements for imports and the adoption of a schedule of tariffs’ elimination.

It is worth pointing out that Brazil returned to democracy from its military regime in the 1980s. As I have already argued in chapter III on the Brazilian dimension of access to justice, the Constitution of 1988, which is the present Constitution of Brazil, established the restoration of democracy as a supreme value, the choice for an *Estado de Direito* (*Rechtsstaat*) and formulated the protection of fundamental rights as the core of the entire legal order.

⁵⁶¹ The source of the information is an official website of the Brazilian government. The original text in Portuguese may be found at <http://www.mdic.gov.br/sitio/interna/interna.php?area=5&menu=228>. Date of access: 20th November 2013.

⁵⁶² ‘*Comissão de Política Aduaneira*’, in Portuguese. It is also simply known as CPA.

At the beginning of the mandate of President Fernando Collor in the year 1990, there was a comprehensive reform in the structure of the country's federal public administration. As a result, the administration of foreign trade was transferred to the Department of Foreign Trade (DECEX), which is subordinated to the National Secretariat for Economic Affairs (SNE)⁵⁶³ of the Ministry of Economy, Finance and Planning (MEFP).⁵⁶⁴

During the government of President Itamar Franco, the Ministry of Industry, Trade and Tourism (MICT) was created. The Secretariat of Foreign Trade (SECEX), which took over the functions previously assigned to DECEX/SNE/PFEM, became subordinated to the MICT.

In 1994, the Brazilian Congress approved the final act that embodies the results of the Uruguay Round of multilateral trade negotiations of the GATT, including the new agreements on anti-dumping, subsidies and countervailing measures and safeguards, as well as the Marrakesh Agreement establishing the WTO.

In 1995, during the government of President Fernando Henrique Cardoso, the Department of Trade Defence (DECOM)⁵⁶⁵ was created in order to work as a specialised organ to conduct investigations concerning the application of anti-dumping legislation, subsidies and countervailing and safeguard measures. Also in 1995 the customs union within the Common Market of the South (MERCOSUR) was approved and a Common External Tariff (CET) by all 4 Member States of the bloc at that time – i.e., Argentina, Brazil, Paraguay and Uruguay – was adopted.

The competence for the application of trade defence measures, which was initially of the Minister of Industry, Trade and Tourism (subsequently Minister of Development, Industry and Foreign Trade) as well as the Minister of Finance, was transferred from 2001 onwards to the Brazilian Chamber of Foreign Trade (CAMEX).⁵⁶⁶

⁵⁶³ '*Secretaria Nacional de Economia*', in Portuguese. It is also known as SNE.

⁵⁶⁴ '*Ministério da Economia, Fazenda e Planejamento*', in Portuguese. It is also known as MEFP.

⁵⁶⁵ '*Departamento de Defesa Comercial*', in Portuguese. It is also known as DECOM.

⁵⁶⁶ '*Câmara de Comércio Exterior*', in Portuguese. It is also known as CAMEX.

Through the enactment of law 9,019 of 1995 with the modifications introduced by the provisional measure Nr. 2,158-35 of 24th August 2001 as well as the decree Nr. 4,732 of 10th June 2003, the following competencies in terms of trade defence measures were established for CAMEX: (1) application of provisional measures; (2) homologation of price undertakings; (3) closing of investigations with the implementation of definitive measures; (4) suspension, amendment or extension of definitive measures, and (5) closure of revision of definitive rights or price undertakings. It is worth pointing out that all decisions listed above are taken based on reports prepared by the DECOM.⁵⁶⁷⁻⁵⁶⁸

The current legal basis concerning trade protection in Brazil is as follows:

General Legislation

- Legislative decree Nr. 30 of 15th December 1994 which approved the final act of the GATT Uruguay Round of Multilateral Trade Negotiations, the lists of Brazil's concessions in the tariffs field (list III) and in the services sector, and the text of the multilateral agreement on bovine meat.
- Law Nr. 9,019 of 30th March 1995 with the modifications introduced by Art. 53 of the provisional measure Nr. 2,113 of 2001 which provides for the implementation of the rights under the Anti-Dumping Agreement and the WTO Agreement on Subsidies and Countervailing Measures.
- Decree Nr. 4,732 of 10th June 2003 on the Brazilian Chamber of Foreign Trade (CAMEX).
- SECEX circular letter Nr. 59 of 28th November 2001 which makes publicly available the understanding regarding the conduct of trade defence investigations.

⁵⁶⁷ For more details, see *Portaria* SECEX Nr. 3, which was published in the federal official gazette ('*Diário Oficial da União – DOU*') of 8th February 2013, and the rectification of the same *Portaria*, which was published in the federal official gazette of 14th February 2013.

⁵⁶⁸ '*Portaria*' can be translated as 'administrative rule', 'ordinance' or 'regulation'. A *Portaria* is a binding internal administrative act under which heads of state departments issue special or general determinations to their subordinates.

- SECEX *Portaria* Nr. 03 of 07th February 2013 regarding the protocol service of the Secretariat of Foreign Trade.
- SECEX *Portaria* Nr. 38 of 19th September 2013 which regulates the legal representation of interested national and foreign parties – both natural and legal persons – in procedures of trade defence.

Anti-Dumping Legislation

- The Anti-Dumping Agreement as approved by the legislative decree Nr. 30 of 15th December 1994 and promulgated by decree Nr. 1,355 of 30th December 1994.
- Decree Nr. 8,058 of 26th July 2013 (decree in force since 1st October 2013) which regulates the administrative procedures relating to the investigation and application of anti-dumping measures.
- Decree Nr. 1,602 of 23rd August 1995 with the rules governing the procedures for the application of anti-dumping measures.
- Law Nr. 12,546 of 14th December 2011 which provides for the relationship between trade defence investigations and non-preferential rules of origin.
- SECEX *Portaria* Nr. 34 of 10th September 2013 which regulates the submission of documents to the Department of Trade Defence (DECOM) in administrative processes defined in decree Nr. 8,058 of 26th July 2013.
- SECEX *Portaria* Nr. 36 of 19th September 2013 which defines that the proposals for price undertakings submitted by producers and exporters in dumping investigations shall conform to the provisions of this *Portaria*.
- SECEX *Portaria* Nr. 37 of 19th September 2013 defining that the petitions for the evaluation of the scope of Art. 147 of decree Nr. 8,058 of 26th July 2013 that are

filed on or after 1st October 2013 shall be prepared in accordance with the provisions of this *Portaria*.

- SECEX *Portaria* Nr. 41 of 11th October 2013 which provides for the necessary information for the elaboration of petitions pertaining to anti-dumping investigations (also in accordance with Art. 39 of decree Nr. 8,058 of 26th July 2013).
- SECEX *Portaria* Nr. 44 of 29th October 2013 defining the necessary information for the elaboration of petitions concerning end-of-period reviews (also in accordance with Art. 106 of decree Nr. 8,058 of 26th July 2013).

Legislation on Subsidies

- WTO Agreement on Subsidies and Countervailing Measures approved by the legislative decree Nr. 30 of 15th December 1994 and promulgated by decree Nr. 1,355 of 30th December 1994.
- Decree Nr. 1,751 of 19th December 1995 with the rules governing the administrative procedures for the implementation of countervailing measures.
- SECEX circular Nr. 20 of 02nd April 1996 with a roadmap for the development of petitions concerning investigations about the application of subsidies.

Legislation on Safeguards

- Agreement on Safeguards as approved by the legislative decree Nr. 30 of 15th December 1994 and promulgated by decree Nr. 1,355 of 30th December 1994.
- Decree Nr. 1,488 of 11th May 1995 which has the rules governing the administrative procedures for the application of safeguard measures.

- Decree Nr. 1,936 of 20th June 1996 which modified provisions of decree Nr. 1,488 of 11th May 1995 and determines that safeguard measures shall be applied as an increase in import tax.
- Decree Nr. 2,667 of 10th July 1998 about the implementation of the nineteenth additional protocol to the Economic Complementation Agreement Nr. 18 between Argentina, Brazil, Paraguay and Uruguay.

Anti-circumvention Legislation

- CAMEX resolution Nr. 63 of 17th August 2010 which regulates the extension of the anti-dumping and countervailing measures that are mentioned in Art. 10-A of law Nr. 9,019 of 1995 (altered by CAMEX resolution Nr. 25 of 5th May 2011).
- SECEX *Portaria* Nr. 21 of 18th October 2010 which defines the anti-circumvention rules (altered by SECEX *Portaria* Nr. 14 of 13th May 2011).
- SECEX *Portaria* Nr. 42 of 17th October 2013 which, in accordance with Art. 79 of decree Nr. 8,058 of 26th July 2013, is about the necessary information for the preparation of petitions concerning anti-circumvention revisions.

Legislation about the Technical Group of Evaluation of Public Interest - GTIP

- CAMEX resolution Nr. 13 of 29th February 2012 which creates the Technical Group of Evaluation of Public Interest.⁵⁶⁹ The purposes of GTIP are (1) analysing the suspension or modification of definitive anti-dumping and countervailing measures as well as (2) examining the non-application of provisional anti-dumping and countervailing measures on grounds of public interest.

a. Brazilian Chamber of Foreign Trade – CAMEX

⁵⁶⁹ ‘*Grupo Técnico de Avaliação de Interesse Público*’, in Portuguese. It is also known as GTIP.

The mission of CAMEX is formulating, adopting, implementing and coordinating policies and activities that regard foreign trade in goods and services, including tourism. CAMEX was created by decree Nr. 4,732 of 10th June 2003 and is part of the Government Council of the Presidency of the Republic of Brazil. The Minister of Development, Industry and Foreign Trade chairs CAMEX. Its board is also composed by the Minister of Finance, the Chief of Staff Minister (i.e., Minister of ‘*Casa Civil*’), the Minister of External Relations, the Minister of Planning, Budget and Management, the Minister of Agriculture, Livestock and Food Supply, and the Minister of Agrarian Development.⁵⁷⁰

Due to the wide scope of foreign trade and the many interests related to it, several public administration bodies have competencies, implement actions and develop policies linked to foreign trade matters. Thus, in order to enable the government an integrated action, CAMEX sets guidelines, and coordinates and directs actions of governmental bodies that have competencies in the field of foreign trade. Furthermore, CAMEX is also a forum in which an interaction between trade and competition takes place.⁵⁷¹⁻⁵⁷²

⁵⁷⁰ The source of the information is an official website of the Brazilian government. The original text in Portuguese may be found at <http://www.camex.gov.br/conteudo/exibe/area/1/menu/67/A%20CAMEX>. Date of access: 20th November 2013.

⁵⁷¹ The list of competencies of the Brazilian Chamber of Foreign Trade is long. They are defined in Decree Nr. 4,732 of 10th June 2003. The main CAMEX competencies (in Portuguese) are the following ones:

- *definir diretrizes e procedimentos relativos à implementação da política de comércio exterior;*
- *coordenar e orientar as ações dos órgãos que possuem competências na área de comércio exterior;*
- *definir, no âmbito das atividades de exportação e importação, diretrizes e orientações sobre normas e procedimentos, para os seguintes temas, observada a reserva legal: a) racionalização e simplificação do sistema administrativo; b) habilitação e credenciamento de empresas para a prática de comércio exterior; c) nomenclatura de mercadoria; d) conceituação de exportação e importação; e) classificação e padronização de produtos; f) marcação e rotulagem de mercadorias; e g) regras de origem e procedência de mercadorias;*
- *estabelecer as diretrizes para as negociações de acordos e convênios relativos ao comércio exterior, de natureza bilateral, regional ou multilateral;*
- *orientar a política aduaneira, observada a competência específica do Ministério da Fazenda;*
- *formular diretrizes básicas da política tarifária na importação e exportação;*
- *estabelecer diretrizes e medidas dirigidas à simplificação e racionalização do comércio exterior;*
- *estabelecer diretrizes e procedimentos para investigações relativas a práticas desleais de comércio exterior;*
- *fixar diretrizes para a política de financiamento das exportações de bens e de serviços, bem como para a cobertura dos riscos de operações a prazo, inclusive as relativas ao seguro de crédito às exportações;*
- *fixar diretrizes e coordenar as políticas de promoção de mercadorias e de serviços no exterior e de informação comercial;*

The main bodies in the framework of CAMEX are the Council of Ministers of the Brazilian Chamber of Foreign Trade,⁵⁷³ the Executive Management Committee (GECEX),⁵⁷⁴ the Committee on Financing and Guarantee of Exports (COFIG),⁵⁷⁵ the Private Sector Advisory Council (CONEX)⁵⁷⁶ and the Executive Secretariat.⁵⁷⁷

b. Department of Trade Defence – DECOM

DECOM⁵⁷⁸ is part of the Secretariat of Foreign Trade (SECEX) of the Ministry of Development, Industry and Foreign Trade (MDIC). The Department of Trade Defence is responsible for (1) examining the origin and the merits of petitions requesting the start of investigations concerning dumping, subsidies and safeguards with a view to the defence of domestic production, (2) proposing the opening and conduction of investigations for the application of anti-dumping, countervailing and safeguard measures, (3) recommending the application of the trade defence measures that are defined in the WTO agreements, (4) following at the WTO the discussions concerning the rules and the application of trade defence agreements, (5) participating

- opinar sobre política de frete e transportes internacionais, portuários, aeroportuários e de fronteiras, visando à sua adaptação aos objetivos da política de comércio exterior e ao aprimoramento da concorrência;

- orientar políticas de incentivo à melhoria dos serviços portuários, aeroportuários, de transporte e de turismo, com vistas ao incremento das exportações e da prestação desses serviços a usuários oriundos do exterior;

- fixar as alíquotas do imposto de exportação, respeitadas as condições estabelecidas em lei;

- fixar as alíquotas do imposto de importação, atendidas as condições e os limites estabelecidos em lei;

- fixar e suspender salvaguardas, direitos antidumping e compensatórios, provisórios ou definitivos;

- estender as medidas antidumping e compensatórias a terceiros países, bem como a partes, peças e componentes dos produtos objeto de medidas vigentes;

- homologar compromissos de preços no âmbito dos processos de defesa comercial;

- definir a utilização das receitas oriundas da cobrança dos direitos antidumping e compensatórios, bem - como sua extensão, e das receitas oriundas da cobrança das salvaguardas;

- alterar, na forma estabelecida nos atos decisórios do Mercado Comum do Sul - MERCOSUL, a Nomenclatura Comum do MERCOSUL;

- adotar medidas para proteger os interesses comerciais brasileiros nas relações comerciais com países que descumprirem acordos firmados bilateral, regional ou multilateralmente, inclusive de retaliação;

- deliberar sobre as matérias submetidas pelos membros e órgãos integrantes.

⁵⁷² For more details, visit: www.camex.gov.br/conteudo/exibe/area/1/menu/67/A%20CAMEX#this.

⁵⁷³ ‘Conselho de Ministros da Câmara de Comércio Exterior’, in Portuguese.

⁵⁷⁴ ‘Comitê Executivo de Gestão’ (GECEX), in Portuguese.

⁵⁷⁵ ‘Comitê de Financiamento e Garantia das Exportações’ (COFIG), in Portuguese.

⁵⁷⁶ ‘Conselho Consultivo do Setor Privado’ (CONEX), in Portuguese.

⁵⁷⁷ ‘Secretaria Executiva’, in Portuguese.

⁵⁷⁸ ‘Departamento de Defesa Comercial’, in Portuguese. It is also known as DECOM.

in international negotiations on trade defence, and (6) following trade defence investigations opened by third countries against Brazilian exports and providing defence assistance (in conjunction with other governmental bodies and the private sector) to the exporter.⁵⁷⁹

9. Chapter Conclusion

Due to the complexity of behaviours and the constant changes that have occurred in modern and globalised society, the right of access to justice is in crisis. This is especially evident in countries like Brazil, which have methods of solving conflicts that remain very bureaucratic, deficient, and less open to what is happening abroad. Brazil has economic, political, social, and cultural factors that are reflected, directly and indirectly, in the performance of the judiciary. Facts clearly show a gap between normative statements and problems. While on the one hand generally there are the formal guarantees for rights, on the other hand there are frequently no prospects for the pursuit of adjudication. Economic resources tend to work in Brazil as partial acquirers of not only access to justice but also court decisions that are favourable for one of the parties through the use of procedural strategies and tricks, in addition to the bad faith of attorneys. The party that usually wins is the party that has the best legal advice.

Brazil's problem concerning access to justice, as we have seen, must be combated with more servers and judges, who need better training and ongoing retraining, reforms in the organisation of courts and in the system of appeals, reduction of the litigiousness in the public administration, a general decrease in the number of lawsuits in the country, especially those involving disputes that do not have to be solved by the judiciary, but, instead, through arbitration, mediation and private settlement. Furthermore, attorneys need to be prepared and must have the ability to positively contribute to the outcome of the lawsuit, that is, so that the trial becomes speedy and effective. This is a complex task which may be initiated by surveys in every court to

⁵⁷⁹ The source of the information above is an official website of the Brazilian government. The original text in Portuguese may be found at <http://www.mdic.gov.br/sitio/interna/interna.php?area=5&menu=228>. Date of access: 20th November 2013.

determine which types of disputes have more frequency and, consequently, increase the number of judges and servers for them, including state prosecutors, public defenders, court-appointed experts and process servers. All these professionals should improve their skills in specialised institutes and through compulsory courses when there are new laws that generate legal and administrative changes. In terms of economic law, the proposals above should not be limited to Brazilian legislation, but of course involve MERCOSUR law, WTO law and human rights. Doing so would undoubtedly be the best for all the parties, the judiciary, the society and the country. In other words, it would amount to a frequent familiarisation of the Brazilian judiciary *vis-à-vis* the law of integration and international economic law. A similar strategy may also be organised by the Brazilian Bar Association regarding the country's attorneys. Furthermore, court costs should become more moderate and proportionate to the amounts in dispute.

The legislation of the country also needs to be fully revised. Nonetheless, this is not a purely legal task, given that it depends on the political will of the legislative power, and its dynamic effort as well. The legislative power, and executive too, represent the main obstacles to these changes.

Ultimately, it is about a decision to execute a change of mentality, which should no longer be so nationalistic and outdated – a variant of the 'Anglo-Saxon tradition', some could argue. Concerning such a change, it is opportune to refer to *Hess's* thoughts. For her, the fundamental elements of the State and also human rights should be taught at Brazilian high schools, similarly to what is done in Germany and the United States in order to encourage the understanding of citizenship.⁵⁸⁰ In this regard, it is curious that in Brazil it is possible to vote in political elections from 16 years of age (facultative voting) even without any knowledge of the governmental system, the State and the Constitution. An even more disturbing situation commences when citizens reach the age of 18,⁵⁸¹ as they now have the obligation to vote in elections (not a right anymore). Thus, regardless of the level of education, all adults are obliged to vote with the only exception to this rule being citizens without full civil capacity. *Fontainha* suggests that the absence of a solid basic education in Brazil alone

⁵⁸⁰ Hess, p. 197.

⁵⁸¹ 18 is the civil and criminal legal age in Brazil.

marginalises millions of citizens, thus leaving them to go hungry also in terms of the realisation of their fundamental rights.⁵⁸²

A successful change of mentality may make citizens and public administration comply with the new legal system. This change must start not only with the advice of attorneys, legal counsellors, assistants, prosecutors and attorneys general but also upon the advice of teachers, professors, researchers, economists, journalists, etc. This would reduce the work for judges and also the costs for litigants.

With regard to Brazilian constitutional law and international law, I explained in this chapter that Brazil's highest court of justice – the *Supremo Tribunal Federal* – has already affirmed that the current Brazilian constitutional system does not enshrine the principles of direct effect or immediate applicability of international treaties and conventions. The same court also stated that MERCOSUR norms that were not implemented in Brazil may neither be invoked by private parties nor applied domestically until all necessary steps for their entering into force have been performed.⁵⁸³ While on the one hand this is one among several examples of how problematic the sovereignty issue may become in Brazil, on the other hand one should not forget that a supreme court may change its views over time. National supreme courts must realise that the current world order demands the 'opening up of constitutional states'.⁵⁸⁴ As I have already argued, the contemporary State must be a 'cooperative constitutional State'⁵⁸⁵ and, as such, must have a 'constitutional openness' to international law and result from cooperativism among peoples.⁵⁸⁶ Given that there is a number of constitutional obstacles to both the implementation and enforcement of international law (including MERCOSUR law of integration) as well as the creation of possible supranational institutions with decision-making power, the STF seems to be the most appropriate national institution to initiate constitutional changes. It can create new interpretations of specific issues and provide legal

⁵⁸² Fontainha, Fernando de Castro, p. 31

⁵⁸³ STF, CR 8,279/Arg – 17th June 1998.

⁵⁸⁴ For details on the 'opening up of constitutional states', see Cottier, Thomas, *Globalisierung des Rechts – Herausforderung für Praxis, Ausbildung und Forschung*, in: *Zeitschrift des Bernischen Juristenvereins*, Vol. 133 (1997), p. 224, quoted in Cottier/Hertig, p. 270.

⁵⁸⁵ Häberle, Peter, *Estado constitucional cooperativo* (translated by Marco Augusto Maliska and Elises Antoniuk), Rio de Janeiro, 2007, p. 1 f., quoted in Figueiredo, p. 90.

⁵⁸⁶ Figueiredo, p. 90.

responses to society which the legislative and executive powers could have provided before, but did not provide due to voluntarism, political negligence, not reaching a common understanding or simply lack of time because of other issues deemed to be more important. While a *Solange* method at the STF should be considered as too far-fetched, the STF nevertheless has the potential of improving the 'Brazilian identity' in terms of international cooperation and responsibility, thereby making the Brazilian State a bit more of a 'cooperative constitutional State' than it has been so far and evoking a stronger sense of interdependence and shared responsibility in an international legal system that is no longer at the disposition of the Nation State and national law.⁵⁸⁷

⁵⁸⁷ For details on the new hierarchical structure of the international legal system, see Weiler, Joseph H.H./Paulus, Andreas L., *The Structure of Change in International Law or Is There a Hierarchy of Norms in International Law?*, in: *European Journal of International Law* 8 (1997), p. 545 et seq.; Koskenniemi, Martti, *Hierarchy in International Law: A Sketch*, in: *European Journal of International Law* 8 (1997), p. 566 et seq.; and Salcedo, Juan A. C., *Reflections on the Existence of a Hierarchy of Norms in International Law*, in: *European Journal of International Law*, Vol. 8 (1997), Nr. 4, p. 583 et seq.

Chapter IV

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The MERCOSUR Dimension of Access to Justice

1. Introduction to Chapter IV

After linking access to justice to trade and multilevel trade regulation, and looking at Brazil and how access to justice is addressed in the country, Chapter IV is dedicated to the MERCOSUR. There is a Latin American approach towards multilevel governance that also applies to the MERCOSUR countries. It is different from the U.S. and EU approaches. While the U.S. approach is marked by Westphalian characteristics, *Realpolitik* and both an exceptionalism and a providentialism based on its origins as a ‘promised land’ for immigrants and refugees, the EU approach was created after World War II by neo-Kantian scholars, and is normative and post-Westphalian.⁵⁸⁸ Hence, the aim of the EU approach can be described as creating a place of peace and prosperity for its people and anybody else who follows the EU model in multilevel governance. By contrast, the Latin American approach and, consequently, also the MERCOSUR approach have some U.S. ingredients but also some sort of anti-Americanism. There are presidentialist governments for societies with strong nationalisms rooted in national identities and a political culture of Iberian and Western-European sovereignty. Sovereignty is defended as a legal principle and axiological aim of foreign policy – even if in conflict with democracy and human rights. MERCOSUR Member States agree on common policies for the region, but they act independently in global governance.⁵⁸⁹ *Sanahuja* describes this kind of governance strategy as ‘defensive multilateralism’ and ‘Southfalian’.⁵⁹⁰

As to the structure of this chapter, I first provide an overview of the MERCOSUR and then analyse specific issues, namely its legal sources, the relation of its law with

⁵⁸⁸ Can be called either ‘post-Westphalian’ or ‘post-Modern’.

⁵⁸⁹ Sanahuja, José Antonio, ‘*Latin American Approaches to Effective Multilateralism and Global Governance*’, presentation on 6th December 2013 at the Global Governance Programme conference ‘*Global Governance from Regional Perspectives: Exploring and Bridging Cultural Differences*’ at the Robert Schuman Centre for Advanced Studies of the European University Institute, in Florence, Italy. The information above is based on my personal notes.

⁵⁹⁰ *Ibid.*

Brazilian constitutional law and human rights, and, lastly, access to justice at MERCOSUR level.

2. Introduction to the MERCOSUR and Historical Background

The MERCOSUR was created through an extensive process that started in the 1960s in Latin America. Its formation, however, was only possible through the *Asociación Latinoamericana de Integración* (ALADI),⁵⁹¹ the ‘Latin American Association of Integration’, which was established in the 1980s. The ALADI was fundamental for Argentina and Brazil strengthening their bilateral relations and starting an approximation in the mid-1980s after both countries returned to democracy from their respective military regimes. These relations led mainly to the formation of the MERCOSUR.

One of the key elements of the MERCOSUR is the *Programa de Integración y Cooperación entre Argentina y Brasil* (PICAB), the ‘Integration and Cooperation Programme between Argentina and Brazil’, which had began in 1986. The first phase of the cooperation between the two countries (from 1986 to 1990) is marked by the maintenance of a protectionist-etatistic model of economic policy as well as cooperation in some specific economic sectors. Since the reciprocal exchange of goods fell back after initial escalations, this was as phase of little trade success. However, it had a positive impact on the consolidation of political contacts and confidence building.

The second phase of the cooperation between Argentina and Brazil (from 1990 to 1995) was marked by strong changes in the cooperation’s general requirements. The execution of liberal economic reforms modernised the economic policy of both

⁵⁹¹ It was established on 12th August 1980 by the *Tratado de Montevideo* („Treaty of Montevideo“) and entered into force on 18th March 1981. Its Member States are Argentina, Bolivia, Brazil, Chile, Colombia, Cuba, Ecuador, Mexico, Paraguay, Peru, Uruguay und Venezuela. This Latin American integration association was supposed *inter alia* to build a common market, but this did not take place. On the other hand, the ALADI developed trade among its Member States through preferential tariffs. Later, it transformed itself into a “more loose organisation for the promotion of trade and for a long term goal developing a common market” (Peña, Félix, *Mercosur as part of South American integration processes*, In: Ott, Andrea/Vos, Ellen (Eds.), *Fifty Years of European Integration: foundations and perspectives*, The Hague, 2009, p. 374).

countries. The opening of the national markets through customs reductions and the privatisation of State-owned enterprises were the main features of these reforms. The so-called *Plano de Convertibilidad* in Argentina (in 1991) and the *Plano Real* in Brazil (in 1994) were primarily established to combat the high inflation levels of both countries. These *Planos* managed to bring both Argentinean and Brazilian inflation to average international levels. One measure of the plans was to interlink the national currencies to the U.S. Dollar. Sustained stabilisation results have been achieved in this way.⁵⁹²

Because of the market opening, Argentina and Brazil began receiving private investments like never before as it was a strategic opportunity to expand businesses in markets with relatively low competition environments. There was, for example, a significant increase in the exchange of goods simply because of the customs reductions in both countries.

The main reasons for the participation of Paraguay and Uruguay in the Argentinean-Brazilian cooperation were the imminent establishment of the North American Free Trade Agreement (NAFTA)⁵⁹³ and the approaching launch of the European single market in 1992 through the Single European Act of 1987 and, thus, an increasing tendency for the emergence of new regional blocs. In the preamble of the Treaty of Asunción,⁵⁹⁴ which is regarded as the founding Treaty of the MERCOSUR and is also known as ‘MERCOSUR Treaty’, the Member States expressly stated that “having in mind the development of international affairs, in particular the consolidation of large economic areas, and the importance of securing the State Parties a proper place in the international community” (...) “this integration process is an appropriate response to such international developments”.

⁵⁹² Wehner, Ulrich, *Der Mercosur: Rechtsfragen und Funktionsfähigkeit eines neuartigen Integrationsprojektes und die Erfolgsaussichten der Interregionalen Kooperation mit der Europäischen Union*, Baden-Baden, 1999, p. 48 with further references.

⁵⁹³ The North American Free Trade Agreement was established on 1st January 1994 and is an enormous trade association between Canada, the United States of America and Mexico.

⁵⁹⁴ *Tratado de Asunción* in Spanish and *Tratado de Assunção* in Portuguese.

Although Uruguay had bilateral agreements not only with Argentina but also with Brazil⁵⁹⁵ and, consequently, an interest in working closer with both countries, it was initially barred from the planning of the Argentinean-Brazilian integration process. Differently from Uruguay, Paraguay had another position in the beginning of the process. The country, which only returned to democracy in 1989 after the end of the Stroessner dictatorship,⁵⁹⁶ showed no interest in active participation.

The aforementioned first steps of the integration process of the Common Market of the South took place between the years 1985 and 1990. This period is characterised by a simple and purely intergovernmental structure without common institutions. In total, six bilateral agreements and several protocols have been adopted. Paraguay and Uruguay, which are also MERCOSUR founding Member States, played only a passive role in this period.

The very first step for the rapprochement between Argentina and Brazil, however, was the *Declaración de Iguazú* (the ‘Iguazú Declaration’), which was signed on 30th November 1985. This document expressed both parties’ firm political commitments to bilateral integration.⁵⁹⁷ It was not simply a memorandum of understanding between the two States since a *Comisión Mixta de Alto Nivel* (a ‘Mixed Commission of High Level’) was constituted in order to elaborate concrete proposals for the economic integration between the two countries.⁵⁹⁸ The recommendations of the Mixed Commission of High Level, which was chaired by the Foreign Ministers of both countries, led to the signing in 1986 of the *Acta para la Integración Argentino-Brasileña* (the ‘Argentinean-Brazilian Integration Act’) as well as twelve additional protocols. The main topic of the cited integration act was the development of the PICAB, which is, as already mentioned, one of the key elements of the MERCOSUR. The purpose of the PICAB was a gradual opening of the national markets. This

⁵⁹⁵ “Uruguay war bereits seit Mitte der siebziger Jahre durch bilaterale Verträge, das Wirtschaftliche Kooperationsabkommen – den *Convenio Argentino-Uruguayo de Cooperación Económica* (CAUCE) – mit Argentinien und dem Protokoll zur Handelserweiterung – *Protocolo de Expansión Comercial* (PEC) – mit Brasilien verbunden” (Wehner, Ulrich, *Der Mercosur: Rechtsfragen und Funktionsfähigkeit eines neuartigen Integrationsprojektes und die Erfolgsaussichten der interregionalen Kooperation mit der Europäischen Union*, p. 55).

⁵⁹⁶ Alfredo Stroessner Matiauda was the President of Paraguay from 1954 to 1989.

⁵⁹⁷ According to item 18 of the *Declaración de Iguazú*.

⁵⁹⁸ Haller, Arnd, *Mercosur: Rechtliche Würdigung der außenwirtschaftlichen Beziehungen und Vereinbarkeit mit den Welthandelssystem*, Münster, 2001, p. 24.

opening should be undertaken in branches in order to gradually and selectively increase and diversify trade. It has also been specified⁵⁹⁹ that the establishment of a 'common economic area' should be a further goal.

Consequently, unlike other integration projects, no well-established model of economic law – such as a free trade area, customs union or common market – was selected.⁶⁰⁰

Sectoral protocols covering different areas should be completed by stages. Tariff and non-tariff barriers to trade should, therefore, not be removed altogether, but sector by sector and, hence, progressively promote the economic integration.⁶⁰¹ However, the integration programme had neither institutions to monitor and implement the determined steps to be taken nor a concrete timetable for the gradual liberalisation. The overall integration results, on the other hand, are considered positive, since herewith the foundation for further cooperation between the parties has been established. In the mid-1990s, the United Nations Economic Commission for Latin America and the Caribbean evaluated the MERCOSUR as the most successful approach to integration in South America.⁶⁰²

Today, the MERCOSUR attracts interest in several parts of the world. It is governed by the law that was established by the Treaty of Asunción, is a source of law and has a dispute settlement mechanism. So, the control and enforcement of the rights and obligations of the MERCOSUR legal order are imperative for their consolidation and development. Currently, the MERCOSUR has 5 Member States: Argentina, Brazil, Paraguay, Uruguay and Venezuela.

⁵⁹⁹ Haller, Arnd, p. 24.

⁶⁰⁰ Herdegen, Matthias, *Internationales Wirtschaftsrecht*, 4th ed., München, 2003, § 3 side note 33.

⁶⁰¹ Arnaud, Vicente Guillermo, *Mercosur, Unión Europea, Nafta y los procesos de integración regional*, Buenos Aires, 1999, p. 108.

⁶⁰² Basedow, Jürgen, *Einführung*, in: Basedow, Jürgen/Samtleben, Jürgen (Eds.), *Wirtschaftsrecht des MERCOSUR – Horizont 2000*, Baden-Baden, 2001, p. 07.

2.1. The situation of Paraguay and Venezuela

Paraguay was suspended from the MERCOSUR in June 2012. The cornerstone of the suspension was the impeachment of Paraguay's President Fernando Lugo and his quick removal from his office. This is supposed to have caused a 'breakdown of democracy' in Paraguay. Some national governments – including the governments of Argentina and Brazil – even considered the impeachment procedure a *coup d'etat* and refused to recognise the new President. Nevertheless, there are some 'strange' coincidences surrounding Paraguay's suspension. One of them is the fact that Paraguay was the only MERCOSUR Member State that did not ratify Venezuela's membership in the bloc. The request from Venezuela to become a MERCOSUR Member State was officially accepted by the Common Market Council through its decision 29/05 of 8th December 2005. While Uruguay and Argentina were the first Members to ratify Venezuela's membership, Brazil ratified it only in December 2009 after several debates at the Chamber of Deputies (the lower house) and Federal Senate (the upper house) of its National Congress.⁶⁰³ Thus, after the Brazilian approval, Venezuela's full membership depended only on Paraguay's ratification. The Ambassador of Paraguay in Lisbon, Luis António Fretes Carreras, openly said at a conference that most of the members of the country's national Congress "are concerned about MERCOSUR's political future with Venezuela, as they do not consider the country to have a democratic government and public institutions continuously disrespect human rights."⁶⁰⁴ Indeed, Paraguay's main argument has always been the lack of democracy and political instability in Venezuela due to the Hugo Chavez government. In any case, a few days after the impeachment of the Paraguayan President in 2012, the remaining MERCOSUR Member States announced Venezuela's MERCOSUR membership. The country was officially 'accepted' on 31st July 2012.

⁶⁰³ The last voting, at the Brazilian Senate, resulted in 35 votes in favour of Venezuela and 27 votes against.

⁶⁰⁴ Personal notes from the speech, delivered in Portuguese, by Luis António Fretes Carreras (ambassador of Paraguay in Portugal) during the ambassadors' roundtable that integrated the programme of the international conference '*A União Europeia e o Mercosul: relações presentes e futuras*', which took place from 5th to 7th December 2011 at the Faculty of Law of the University of Lisbon, in Portugal. The ambassadors' roundtable was named '*O futuro das relações MERCOSUL-UE: políticas globais, regionais, económicas e sociais*' and took place on 7th December. Jorge Faurie (Ambassador of Argentina in Portugal), Mário Vilalva (Ambassador of Brazil in Portugal) and José Ignacio Korzeniak (Ambassador of Uruguay in Portugal) also participated in the roundtable.

It has to be highlighted that the impeachment process in Paraguay, regardless of its duration, was legal. This is because the Paraguayan Constitution demands 2/3 of the lower chamber of Congress (the *Diputados*) to impeach a President and 2/3 of the upper chamber to remove him. The President was accused of what can be translated into English as a ‘bad exercise of his functions as President’. The Constitution foresees impeachment for such a case, however it does not specify what ‘bad exercise’ entails. As a consequence, it depends solely on the Congress to consider if a President has behaved in such a way. Even if the President was not given a chance to defend himself, the legislative process – not judicial, it has to be stressed – still would have been legal. As a final note, this process is different to other legal processes *per se*, and there is no law that specifies any details on how the process should be carried out. A mission of the Organization of American States went to Paraguay in order to gather information and came to the conclusion that the impeachment was not a *coup d'etat*.

There were regular presidential elections in Paraguay in April 2013. The candidate who won the elections is Horacio Cartes. He took his office in August 2013 and immediately started negotiations with the MERCOSUR Member States to return to the bloc. The new government stressed, however, that Venezuela’s membership without Paraguay’s ratification was null and that Paraguay was not going to accept Venezuela.

The latest development concerning the status of both Venezuela and Paraguay in the MERCOSUR took place on 10th December 2013. The new government of Paraguay under the leadership of President Horacio Cartes approved Venezuela’s membership. This was Paraguay’s only choice for joining MERCOSUR again. Brazil and Argentina had negotiated with Paraguay for weeks to reach a solution, as the European Union conditioned the continuation of trade negotiations for a bilateral EU-MERCOSUR agreement to the reincorporation of Paraguay in the MERCOSUR. Paraguay is MERCOSUR’s smallest economy (behind Uruguay) and, while all other MERCOSUR countries do not really even need Paraguay as a trading partner in the bloc, Paraguay needs them.

3. Purposes

The 1980s and the beginning of 1990s, the period of the most serious debt crisis in South America, brought the definitive end of import-substituting industrialisation and the application of neoliberal economic policies. Most South American countries had to open their national economies to the global market in order to earn the necessary foreign currency for the satisfaction of debts.⁶⁰⁵

The failure of economic protectionism and State interventionism towards a basic opening for foreign trade practices and the new economic policy orientation in world economic determinants as well as international competitiveness were crucial to the rapprochement process between Argentina and Brazil.⁶⁰⁶ This rapprochement changed their reciprocal rivalry to a common cooperative relationship, which facilitated significantly the economic integration between both countries.⁶⁰⁷

In contrast to previous integration processes in Latin America – such as the Latin American Free Trade Association (ALALC) and the Latin American Integration Association (LAIA), the Treaty of Asunción laid the foundation for the establishment of a common market based on three fundamental freedoms: free movement of goods, services and factors of production between the Member States.⁶⁰⁸ *Silva*⁶⁰⁹ believes,

⁶⁰⁵ Cf. Tramón, José Miguel Olivares, *Das Vorabentscheidungsverfahren des EuGH als Vorbild des MERCOSUR*, Baden-Baden, 2006, p. 19.

⁶⁰⁶ Schirm, Stefan A., *Globale Märkte, nationale Politik und regionale Kooperation in Europa und in den Amerikas*, Baden-Baden, 1999, p. 137 f.

⁶⁰⁷ Schirm, Stefan A., p. 159 f.

⁶⁰⁸ Art. 1 of the Treaty of Asunción: *Los Estados Partes deciden constituir un Mercado Común, que debe estar conformado al 31 de diciembre de 1994, el que se denominará “Mercado Común del Sur”(MERCOSUR).*

Este Mercado Común implica:

- La libre circulación de bienes, servicios y factores productivos entre los países, através, entre otros, de la eliminación de los derechos aduaneros y restricciones no arancelarias a la circulación de mercaderías y de cualquier otra medida equivalente;

- El establecimiento de un arancel externo común y la adopción de una política comercial común con relación a terceros Estados o agrupaciones de Estados y la coordinación de posiciones en foros económicos comerciales regionales e internacionales;

- La coordinación de políticas macroeconómicas y sectoriales entre los Estados

Partes: de comercio exterior, agrícola, industrial, fiscal, monetaria, cambiaria y de capitales, de servicios, aduanera, de transportes y comunicaciones y otras que se acuerden, a fin de asegurar condiciones adecuadas de competencia entre los Estados Partes;

- El compromiso de los Estados Partes de armonizar sus legislaciones en las áreas pertinentes, para lograr el fortalecimiento del proceso de integración.

however, that capital and labour are also covered by ‘factors of production’. This would mean that the free movement of people and capital and, thus, also the right of establishment are fundamental freedoms. Hence, the MERCOSUR fundamental freedoms can be considered to be almost exactly the same as the fundamental freedoms of Article 3 (c) of the former EC Treaty.⁶¹⁰ But, the EC Treaty, differently from the Treaty of Asunción, includes all EC organs⁶¹¹ and this is why it should not qualify as a ‘*Rahmenvertrag*’⁶¹² (a ‘framework treaty’, in English), but be considered an ‘*Endvertrag*’⁶¹³ (a ‘final treaty’, in English).

Furthermore, the MERCOSUR Member States committed themselves to harmonise their legislations in the fields of trade, agriculture, industry, taxes, money, capital market, services, customs, transport and communications in order to ensure competitive conditions between them. They also obligated themselves to coordinate their macroeconomic policies. Through these purposes, which are explicitly set out in Art. 1 of the Treaty of Asunción, the essential characteristics of the MERCOSUR are presented and thus clarify why it differs from a pure trade area, like the NAFTA, and rather approaches the model of the former European Community. It is important to point out that the MERCOSUR Member States are in a different political, economical, social and legal reality. The Treaty of Asunción clearly documents the Member States’ will to neoliberal market liberalisation policies and definitive reorientation.⁶¹⁴ The Member States, especially the two largest ones, also expect improvements in the competitiveness of their national economies both in the world market and as locations

⁶⁰⁹ Silva, Elaine Ramos da, *Rechtsangleichung im Mercosul: Perspektiven für das Niederlassungsrecht von Gesellschaften anhand von Erfahrungen in der Europäischen Union*, Baden-Baden, 2002, p. 37. She also quotes the following authors: Jaeger Jr., Augusto, *MERCOSUL e a livre circulação de pessoas*, São Paulo, 2000, p. 116 ff; Faria, José Ângelo Estrella, *O Mercosul: Princípios, Finalidade e Alcance do Tratado de Assunção*, Brasília, 1993, p. 41; Salomão Filho, Calixto/Samtleben, Jürgen, *Der Südamerikanische Gemeinsame Markt – eine rechtliche Analyse des MERCOSUR*, in: *Wertpapier-Mitteilungen (WM)*, 1992, Nr. 33, p. 1342.

⁶¹⁰ “Article 3. For the purposes set out in Article 2, the activities of the Community shall include, as provided in this Treaty and in accordance with the timetable set out therein:
(...)

(c) an internal market characterized by the abolition, as between Member States, of obstacles to the free movement of goods, persons, services and capital;”

⁶¹¹ The Parliament is the only exception.

⁶¹² Cf. Ipsen, Hans Peter, *Europäisches Gemeinschaftsrecht*, p. 61, quoted by Fuders, Felix, *Die Wirtschaftsverfassung des Mercosur: eine rechtsvergleichende Darstellung unter besonderer Berücksichtigung des Rechts der Europäischen Union*, Berlin, 2008, p. 42.

⁶¹³ Fuders, 2008, p. 38.

⁶¹⁴ Basedow, Jürgen, *Einführung*, in: Basedow, Jürgen/Samtleben, Jürgen (Eds.), 2001, p. 07.

for foreign investment.⁶¹⁵ On the other hand, the difficulties between the MERCOSUR Member States reflect the problems and resistances encountered by these countries in the implementation of orthodox economic policies so that the future of the MERCOSUR is directly linked to the consistent implementation of economic reforms.

A harmonisation of the legislation of the Member States should finally strengthen the integration process. According to some authors,⁶¹⁶ the largest part of the bloc's list of objectives conforms with the objectives of the EC Treaty. "Same goals, different ways" says *Wehner*⁶¹⁷ in view of the fact that the MERCOSUR, unlike the EC, takes the classic public international law path towards these goals – i.e., the intergovernmental rather than the supranational. For *Kerber*,⁶¹⁸ however, the MERCOSUR is intergovernmental due to Argentina, Paraguay and Uruguay's fear of Brazil, which in a supranational regime could decide everything, as it is the largest country in terms of territory, population and economy. In the current intergovernmental form, each Member State has the same institutional voting and decision-making power. According to the same author, the fact that the Brazilian federal constitution does not contemplate a supranational system may also be seen as a contradiction to Brazil's form of government: 'federative republic'.⁶¹⁹ As *Kerber* explains, the states and municipalities of Brazil are accustomed to being governed by a superior entity.⁶²⁰ This 'superior entity' is the federal government. It can be argued, therefore, that the federal government (also called in Brazil '*União*'⁶²¹) does not want

⁶¹⁵ Tramón, José Miguel Olivares, 2003, p. 48.

⁶¹⁶ For example Kraekel, Britta, *Der Abbau von Maßnahmen kontingentgleicher Wirkung als Instrument der Marktöffnung: Europäische Gemeinschaften und Mercosur im Vergleich*, München, 1997, p. 80; Salomão Filho, Calixto/Samtleben, Jürgen, in: *Wertpapier-Mitteilungen (WM)*, 1992, Nr. 33, p. 1348.

⁶¹⁷ Wehner, Ulrich, *Spezifische Rechtsfragen des Mercosul und der EU-Mercosul-Beziehungen*, in: Wulfdiether Zippel (Ed.), *Die Beziehungen zwischen der EU und den Mercosur-Staaten – Stand und Perspektiven*, Baden-Baden, 2002, p. 84. The expression above in the text was originally in German; my translation.

⁶¹⁸ Jaeger Junior, Augusto, *Apresentação do livro 'Mercosul e a Supranacionalidade', de Gilberto Kerber*, in: Jaeger Junior, Augusto, *Temas de Direito da Integração e Comunitário*, São Paulo, Editora LTr, 2002, p. 260. This author comments on Gilberto Kerber's book *Mercosul e a Supranacionalidade* (São Paulo, Editora LTr, 2001).

⁶¹⁹ The official name of Brazil is '*República Federativa do Brasil*' ('Federative Republic of Brazil', in English). It is a Nation State with a federal republican government.

⁶²⁰ *Ibid.*, p. 261.

⁶²¹ 'Union', in English.

to transfer any portion of its power to a supranational organisation – i.e., a kind of supranational ‘*União*’.

In the meantime, the MERCOSUR also has Associated States, namely Bolivia (since 1995),⁶²² Chile (since 1996),⁶²³ Peru (since 2003),⁶²⁴ Ecuador (since 2004)⁶²⁵ and Colombia (since 2004).⁶²⁶ Venezuela also became an Associated State in 2004.⁶²⁷ As explained, the country also requested full membership, which was formally accepted and subsequently registered through Council decision 29/05 of 8th December 2005. Venezuela’s entry to the MERCOSUR, however, did not take place until 2012 and was only possible through something that can be described as ‘political manoeuvre’ by Argentina, Brazil and Uruguay.

Since July 2013, in addition, there are two other MERCOSUR Associated States: Guyana⁶²⁸ and Suriname.⁶²⁹ Since Paraguay was suspended, it was not consulted about both countries becoming associated. Venezuela, however, was treated like a regular full member.

In 1992, an inter-institutional cooperation agreement between the MERCOSUR Council and the European Commission was signed.⁶³⁰ Three years later, an interregional skeleton agreement between the European Union and the MERCOSUR was signed in Madrid.⁶³¹ The latter agreement provides for the establishment of an interregional association between the two blocs as a long-term objective.

⁶²² Cf. Association Framework Agreement between MERCOSUR and Bolivia, approved at the summit conference of Punta del Este in December 1995.

⁶²³ Cf. Association Framework Agreement between MERCOSUR and Chile, adopted through Council Decision 3/96.

⁶²⁴ Cf. Council Decision 39/03.

⁶²⁵ Cf. Council Decision 43/04.

⁶²⁶ Cf. Council Decision 44/04.

⁶²⁷ Cf. Council Decision 42/04.

⁶²⁸ Cf. Association Framework Agreement between MERCOSUR and Guyana, approved at the summit conference of Montevideo in July 2013.

⁶²⁹ Cf. Association Framework Agreement between MERCOSUR and Suriname, approved at the summit conference of Montevideo in July 2013.

⁶³⁰ Cf. *Acuerdo Interinstitucional entre las Comunidades Europeas y el Mercado Común del Sur*, signed in Santiago de Chile on 9th May 1992.

⁶³¹ It was signed in Madrid on 15th December 1995. For this see Samtleben, Jürgen, *Das Recht des Mercosur – wichtig für Europa?*, in: *Europäische Zeitschrift für Wirtschaftsrecht*, München, 1998, Nr. 09, p. 65.

Also bilateral agreements on mutual economic rapprochement were closed with Mexico,⁶³² the Andean Community,⁶³³ India,⁶³⁴ Egypt,⁶³⁵ Israel⁶³⁶ and Pakistan.⁶³⁷

4. Institutions

The Treaty of Asunción establishing the *Mercado Común del Sur* is a framework treaty and represents the basis for the improvement of the MERCOSUR. The institutional structure of MERCOSUR was retained and later complemented by the *Protocol of Ouro Preto*.

According to Art. 1 of the Protocol of Ouro Preto, the MERCOSUR's organs are:

- The Common Market Council (“*Consejo del Mercado Común – CMC*”);
- The Common Market Group (“*Grupo Mercado Común – GMC*”);
- The Trade Commission of the MERCOSUR (“*Comisión de Comercio del MERCOSUR – CCM*”);
- The Joint Parliamentary Commission (“*Comisión Parlamentaria Conjunta – CPC*”), which later expanded and is nowadays called *Parlamento del Mercosur – PARLASUR* (“Parliament of the MERCOSUR”);⁶³⁸
- The Economic and Social Advisory Forum (“*Foro Consultivo Económico-Social – FCES*”);
- The Administrative Secretariat of the MERCOSUR (“*Secretaría Administrativa del Mercosur – SAM*”).⁶³⁹

The Council, the Common Market Group and the Trade Commission of the MERCOSUR have decision-making ability/power. However, according to Art. 2 of

⁶³² Cf. Council Decision 15/02.

⁶³³ Cf. Council Decision 31/02.

⁶³⁴ Cf. Council Decision 09/03.

⁶³⁵ Cf. Council Decision 16/04.

⁶³⁶ Cf. Council Decision 22/05.

⁶³⁷ Cf. Council Decision 07/06.

⁶³⁸ Two Common Market Council Decisions made this expansion possible, namely: 49/04 and 23/05.

⁶³⁹ Common Market Council Decision Nr. 30/02 renamed it. Today, it is called ‘*Secretaría del Mercosur*’ – SM (“Secretariat of the Mercosur”).

the above mentioned Protocol, they only have an intergovernmental character.⁶⁴⁰ Furthermore, all contracting States are required to be present for decisions to be taken and decisions can only be made unanimously.⁶⁴¹

The Council is the highest organ of the MERCOSUR.⁶⁴² Its main tasks are taking decisions deemed necessary to achieve the objectives of the Treaty of Asunción and – in collaboration with the Common Market Group – enforcing compliance with the Treaty of Asunción and secondary law. But, directly enforceable legal rules, such as the Regulations of the European Communities and the EU, are not foreseen in the Protocol of Ouro Preto.⁶⁴³

Hence, the institutional framework of the MERCOSUR is fundamentally influenced by intergovernmental structures.⁶⁴⁴ Intergovernmentalism is the inter-country cooperation system of most international organisations and, unlike supranationalism, requires unanimous decisions, that is to say by all Member States of an international organisation. This is because countries do not divest any sovereign rights in favour of this kind of cooperation system. Unanimity is based on the consensus principle, which is often criticised. It provides the Member States with the security of not having to accept any decision that goes against national interests⁶⁴⁵ and is also an expression of mutual mistrust. A real integration cannot, as a result, effectively take place under these circumstances.⁶⁴⁶

⁶⁴⁰ Art. 2 of the Protocol of Ouro Preto.

⁶⁴¹ Art. 37 of the Protocol of Ouro Preto.

⁶⁴² Art. 3 of the Protocol of Ouro Preto.

⁶⁴³ Basedow, Jürgen, *Der MERCOSUR als Integrationsmodell*, in: Basedow, Jürgen/Samtleben, Jürgen (Eds.), 2001, p. 17.

⁶⁴⁴ Samtleben, Jürgen, *Das Internationale Prozeß- und Privatrecht des MERCOSUR*, in: *Rabels für ausländisches und internationales Privatrecht*, Nr. 63, Tübingen, 1999, p. 1-69 (5); Grote, Rainer/Silveiro Salgueiro, Jorge, *La construcción del Mercado Común del Sur (MERCOSUR) a través de relaciones jurídicas múltiples*, in: Bendel, Petra/Fischer, Thomas (Eds.), *Wie erfolgreich ist der MERCOSUR?, Das südamerikanische Bündnis aus interdisziplinärer Sicht*, Saarbrücken, 1999, p. 101 f.; Martins, Renata, *Der Südamerikanische Gemeinsame Markt im Überblick*, in: *Recht der Internationalen Wirtschaft*, Heidelberg, 1999, p. 852; Barrios, Harald, *Mercosur: Ein Versuch koordinierten Regierens als Antwort auf externe Herausforderungen*, in: *Ibero-Amerikanisches Archiv*, Nr. 24, Berlin, 1998, p. 170 ff.; all quoted by Basedow, Jürgen, in: Basedow, Jürgen/Samtleben, Jürgen (Eds.) 2001, p. 25.

⁶⁴⁵ Haller, Arnd, 2001, p. 116.

⁶⁴⁶ Ekmekdjian, Miguel Ángel, *Introducción al Derecho Comunitario Latinoamericano (con especial referencia al MERCOSUR)*, Buenos Aires, 1994, p. 208.

Since the year 2002, the *Tribunal Permanente de Revisión del Mercosur* – TPR⁶⁴⁷ (‘Permanent Court of Review of the MERCOSUR’), the *Tribunal Administrativo-Laboral del Mercosur* – TAL⁶⁴⁸ (‘Administrative and Labour Court of the MERCOSUR’) and the *Centro Mercosur de Promoción del Estado de Derecho* – CMPED⁶⁴⁹ (‘MERCOSUR Center for the Promotion of the Rule of Law’) were also established.⁶⁵⁰

4.1. Decision-Making Bodies

The Council (CMC), the Common Market Group (GMC), the Trade Commission (CCM)⁶⁵¹ and, since 2004, also the *Tribunal Permanente de Revisión* (TPR) are the only decision-making bodies of the MERCOSUR. Apart from the TPR,⁶⁵² this is defined in Article 2 of the Protocol of Ouro Preto and means that the aforementioned bodies can pass legislation that is binding. Even if there is no norm in the MERCOSUR that corresponds to Article 5 (1) of the former EC Treaty,⁶⁵³ it can be assumed that the bodies may, as a rule, only act within the limits of their assigned competences.⁶⁵⁴ There is also no subsidiarity clause similar to Article 5 (2) of the former EC Treaty⁶⁵⁵ that stipulates that institutions may, as a rule, only act if a ruling at Community level can be better implemented than at national level.⁶⁵⁶

⁶⁴⁷ It was created in 2002 through the Protocol of Olivos and officially established in 2004, today it is the court of highest instance in the dispute settlement system of the Mercosur.

⁶⁴⁸ It was created in 2003 through the Resolution GMC Nr. 54/03.

⁶⁴⁹ It was created in 2004 through the Council Decision Nr. 24/04.

⁶⁵⁰ For the Parliament of the Mercosur, see the section of this chapter entitled ‘PARLASUR’.

⁶⁵¹ Art. 2 of the Protocol of Ouro Preto explicitly defines the CMC, GMC and CCM as intergovernmental bodies.

⁶⁵² The TPR was created through the Protocol of Olivos.

⁶⁵³ “Article 5 (1). The Community shall act within the limits of the powers conferred upon it by this Treaty and of the objectives assigned to it therein.”

⁶⁵⁴ Dromi, Roberto/Ekmekdjian, Miguel Á./Rivera, Julio C., *Derecho comunitario – Sistemas de integración – Régimen del Mercosur*, Buenos Aires, 1995, p. 168.

⁶⁵⁵ “Article 5 (2). In areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community.”

⁶⁵⁶ Dromi, Roberto/Ekmekdjian, Miguel Á./Rivera, Julio C., p. 168; Bloch, Roberto, *El principio de subsidiariedad en la Unión Europea y en el Mercosur*, in: *Ibid.* (Ed.), *La construcción del Mercosur – La evolución de un nuevo actor en las relaciones internacionales*, Buenos Aires, 2003 p. 143.

The main institutional difference between the MERCOSUR and the European Union is that all the MERCOSUR decision-making bodies, except for the TPR, have intergovernmental character. Therefore, they are intergovernmental decision-making bodies and require the mutual understanding of all Member States for their decisions.⁶⁵⁷ Accordingly, a MERCOSUR Member State does not have to defend itself against decisions of MERCOSUR bodies because its vote can simply prevent decisions being made. That being the case, it is hard to see in the MERCOSUR an institution like the European Commission, since the latter is the plaintiff of most actions of nullity in the European Union.

It is worth highlighting that the Parliament of the MERCOSUR (PARLASUR) is not one of the MERCOSUR decision-making bodies. It does not have any capacity of making binding decisions either on the MERCOSUR institutions or Member States.⁶⁵⁸ Some authors even argue that the PARLASUR has ‘functions’ rather than ‘powers’.⁶⁵⁹

a. The Common Market Council (CMC)

The Council had already been foreseen in the Treaty of Asunción and is the highest organ of the MERCOSUR.⁶⁶⁰ It is responsible for the implementation of the aims of the Asunción Treaty and the political administration of the integration process. The CMC is composed of the Foreign and Economic Ministers of the five Mercosur Member States, which meet as and when required. The Presidents of Argentina, Brazil, Paraguay and Uruguay are also supposed to participate in the meetings at least once every six months. Since 1996, the Presidents of the Associated States have also been entitled to participate in the meetings.

⁶⁵⁷ Art. 37 of the Protocol of Ouro Preto.

⁶⁵⁸ For details on the Parliament of the Mercosur, see the section of this chapter ‘PARLASUR’.

⁶⁵⁹ This is the case of Clarissa Dri and Deisy Ventura. For details, see Dri, Clarissa/Ventura, Deisy, *The MERCOSUR Parliament - A Challenging Position between Late Institutionalization and Early Stalemate*, In: Costa, Olivier/Dri, Clarissa/Stavridis, Stelios (Eds.), *Parliamentary dimensions of regionalization and globalization: the role of inter-parliamentary institutions*. Houndmills, Basingstoke, Hampshire: Palgrave Macmillan, 2013, p. 78.

⁶⁶⁰ Art. 10 of the Treaty of Asunción and Art. 3 of the Protocol of Ouro Preto, respectively.

As with the European Council prior to the Treaty of Lisbon, the Chairman of the CMC is replaced every six months among the MERCOSUR Member States. Unlike the previous process in the European Union, this is done in alphabetical order. The Chair of the Common Market Council also represents the rotating *pro tempore* Presidency of the MERCOSUR.⁶⁶¹

The Council is referred to as the engine of integration in the MERCOSUR⁶⁶². It has an intergovernmental character⁶⁶³. The legal form of action of the Council are *Decisiones* ('Decisions'), which are binding on the Member States⁶⁶⁴.

b. The Common Market Group (GMC)

The GMC is composed of four retained members and four rotating members from each signatory state. These members represent each state's Ministries of Economics and Foreign Affairs as well as their respective national central banks.

The function of the Common Market Group is, together with the Council, to be a '*Guardián del Tratado*' (a 'Guardian of the Treaty'), i.e. to ensure compliance with the provisions of the Treaty of Asunción and Secondary Law.⁶⁶⁵ The Common Market Group is the executive organ of the MERCOSUR⁶⁶⁶ and, like the Council, had already been envisaged in the Treaty of Asunción. As the central executive body of the bloc, it is responsible *inter alia* for the implementation of Council decisions⁶⁶⁷ and the development of programmes to further consolidate the common market.⁶⁶⁸ However, the responsibilities of the GMC were defined later in its own rules of internal procedure.

⁶⁶¹ Cf. Art. 12 of the Treaty of Asunción and Art. 5 of the Protocol of Ouro Preto.

⁶⁶² Barón Knoll de Bertolucci, Silvina, *Administración y Gobierno del Mercosur*, Buenos Aires, 1997, p. 120.

⁶⁶³ Barón Knoll de Bertolucci, Silvina, p. 113.

⁶⁶⁴ For more details, see Article 8 of the Protocol of Ouro Preto as well as Wehner, Ulrich, 1999, p. 85.

⁶⁶⁵ Art. 14 (1) of the Protocol of Ouro Preto.

⁶⁶⁶ Art. 10 of the Protocol of Ouro Preto.

⁶⁶⁷ Art. 14 (3) of the Protocol of Ouro Preto.

⁶⁶⁸ Art. 14 (4) of the Protocol of Ouro Preto.

There are Common Market Group meetings every three months. They rotate in alphabetical order among the Member States. Extraordinary meetings may be called by any State, but the meeting places have to be agreed each time.

The GMC issues *Resoluciones* ('Resolutions') that are binding for the MERCOSUR Member States.⁶⁶⁹

c. The Trade Commission of the MERCOSUR (CCM)

This body was not foreseen by the Treaty of Asunción and was first introduced by the Protocol of Ouro Preto. It consists of four permanent and four non-permanent members per Member State, which are coordinated by the respective national Ministries of Foreign Affairs.⁶⁷⁰ The Trade Commission meets at least once a month or whenever it is convened by the Common Market Group or a Member State.

Like the GMC, the *Comisión de Comercio* ('Trade Commission', in English) is also composed of *Secciones Nacionales* ('national departments', in English).⁶⁷¹ As with the Council, the presidency of the CCM changes every six months. Its main tasks are to support the Common Market Group and enforce the common trade policy both in regards to intra-MERCOSUR trade and trade with third countries.

The Trade Commission of the MERCOSUR issues two different kinds of legal instruments. These are the *Directivas* ('Directives'), which are binding on the Member States, and the *Propuestas* ('Proposals'), which are submitted to the GMC.⁶⁷²

⁶⁶⁹ For more details, see Article 15 of the Protocol of Ouro Preto as well as Barón Knoll, p. 125, and Haller, p. 101.

⁶⁷⁰ Art. 17 of the Protocol of Ouro Preto.

⁶⁷¹ Fuders, Felix, 2008, p. 53.

⁶⁷² For more details, see Article 16 to 20 of the Protocol of Ouro Preto as well as Wehner, Ulrich, 1999, p. 89.

d. PARLASUR

The Parliament of the MERCOSUR – i.e., PARLASUR⁶⁷³ – is an improvement of the former Joint Parliamentary Commission – i.e., the ‘*Comisión Parlamentaria Conjunta*’ (CPC) – and represents an important step concerning the existing democratic deficit in the MERCOSUR. The former CPC, as *Dri* and *Ventura* summarise, was firstly established “with a view of monitoring the internalization of foundational treaties into domestic law and making recommendations to decisional and executive bodies.”⁶⁷⁴ It is worth highlighting that one of the statutory attributions of the Joint Parliamentary Commission defined in its internal rules was the development of actions necessary for establishing a MERCOSUR Parliament. *Dri* explains that in 2004 the CPC had a preliminary version of the project for a constitutive protocol of a Parliament which was also mentioned in the MERCOSUR work program 2004-2006 through CPC provision 01/04 and CMC decision 26/03.⁶⁷⁵ The activities of the commission, however, focused almost exclusively on economic aspects and did not impact on the path of the MERCOSUR.⁶⁷⁶ The CPC members used to meet twice a year, but in most meetings just a few representatives of each national delegation were present.⁶⁷⁷

With regard to the Parliament of the MERCOSUR, while its constitutive protocol was approved by the Common Market Council on 8th December 2005, it was ratified by each of the four Member States of that time (i.e., Argentina, Brazil, Paraguay and Uruguay) and indeed constituted on 14th December 2006 – in other words, with the required approval of all Member States within a record period of time by the bloc’s standards. Headquartered in Montevideo⁶⁷⁸ in a building named ‘Edificio Mercosur’,

⁶⁷³ ‘PARLASUR’ is the abbreviation in Spanish and means “*Parlamento del Mercosur*” while ‘PARLASUL’ is the abbreviation in Portuguese and means “*Parlamento do Mercosul*”.

⁶⁷⁴ *Dri, Clarissa/Ventura, Deisy*, 2013, pp. 70-71.

⁶⁷⁵ *Dri, Clarissa, At What Point does a Legislature Become Institutionalized? The Mercosur Parliament’s Path*, in: *Brazilian Political Science Review*, Vol. 3, Nr. 2, 2009, p. 71. It can be found at <http://www.bpsr.org.br/index.php/bpsr/article/viewFile/15/12>. Date of access: 13th March 2014.

⁶⁷⁶ *Dri, Clarissa/Ventura, Deisy*, 2013, p. 71. The authors also quoted Oliveira, Marcelo, *Mercosul: atores políticos e grupos de interesses brasileiros*, São Paulo, UNESP, 2003, p. 152.

⁶⁷⁷ *Dri, Clarissa/Ventura, Deisy*, 2013, p. 71.

⁶⁷⁸ Art. 21 of the Parliament’s constitutive protocol:

“*Sede*

1. *La sede del Parlamento será la ciudad de Montevideo, República Oriental del Uruguay.*

the PARLASUR was installed 15 years after the creation of the bloc and its first monthly plenary session took place on 7th May 2007. Parliamentarians representing the MERCOSUR Member States took their positions on the same day. While Paraguay selected representatives exclusively for the PARLASUR, all other Member States selected among their congressmen and congresswomen (in the case of Brazil, senators and federal deputies) their respective parliamentarians for the MERCOSUR Parliament. These ‘MERCOSUR parliamentarians’ also continue to belong to their respective national congresses.

The PARLASUR is different from the Parliamentary Conference on the WTO.⁶⁷⁹ Art. 1 of the parliament’s constitutive protocol defines that the Parliament of the MERCOSUR shall be:

“an organ of representation of its peoples, independent and autonomous, and integrate the MERCOSUR institutional structure.

It shall replace the Joint Parliamentary Commission.

It shall be composed of representatives that were elected by universal, direct and secret suffrage, in accordance with the domestic law of each Member State and the provisions of the constitutive protocol.

It shall be unicameral, and its principles, competencies and composition shall be governed according to this constitutive protocol.

The effective installation of the parliament shall take place, at the latest, on the 31st of December of 2006.

The constitution of the Parliament shall be carried out in accordance with the stages defined in the protocol’s transitory dispositions.”⁶⁸⁰

2. El MERCOSUR firmará con la República Oriental del Uruguay un Acuerdo Sede que definirá las normas relativas a los privilegios, las inmunidades y las exenciones del Parlamento, de los parlamentarios y demás funcionarios, de acuerdo a las normas del derecho internacional vigentes.”

⁶⁷⁹ For details about the Parliamentary Conference on the WTO, visit the WTO official website. See also Mann, Erika, *A Parliamentary Dimension to the WTO – More Than Just a Vision?!*, in: *Journal of International Economic Law*, Vol. 7, Nr. 3, 2004, pp. 659-665; and Shaffer, Gregory, *Parliamentary Oversight of WTO Rule-Making: The Political, Normative, and Practical Contents*, in: *Journal of International Economic Law*, Vol. 7, Nr. 3, 2004, pp. 629-654.

⁶⁸⁰ Art. 1 of the constitutive protocol:

Constitución

Constituir el Parlamento del MERCOSUR, en adelante el Parlamento, como órgano de representación de sus pueblos, independiente y autónomo, que integrará la estructura institucional del MERCOSUR. El Parlamento sustituirá a la Comisión Parlamentaria Conjunta.

There is a proportional representation at the Parliament. After discussions about a proportional composition based on the number of inhabitants of every country and a scale defining the number of seats per MERCOSUR Member State (from countries with less than 15 million people up to countries with more than 120 million inhabitants), it was decided that the two largest MERCOSUR countries, Brazil and Argentina, were to elect in the first election only 37 and 26 parliamentarians, respectively.⁶⁸¹ The amount of representatives based on the scale proposed (see the table below for this purpose)⁶⁸² created fear among the smaller States – i.e., Uruguay and Paraguay – of a dominating presence (or hegemony, one could say) by the parliamentarians of Brazil and Argentina, as there were supposed to be 75 seats for Brazil and 43 seats for Argentina.

Population	Number of Seats
Under 15 million	18 parliamentarians
15 to under 40 million	Additional seat for each 1 million inhabitants
40 to under 80 million	Additional seat for each 2.5 million inhabitants
80 to under 120 million	Additional seat for each 5 million inhabitants
Over 120 million	Additional seat for each 10 million inhabitants

Currently, Brazil has 37 representatives in the Parliament, followed by Argentina with 24, Venezuela with 23, Paraguay with 18 and Uruguay also with 18.⁶⁸³ The first direct

El Parlamento estará integrado por representantes electos por sufragio universal, directo y secreto, de acuerdo con la legislación interna de cada Estado Parte y las disposiciones del presente Protocolo.

El Parlamento será un órgano unicameral y sus principios, competencias e integración se rigen según lo dispuesto en este Protocolo.

La efectiva instalación del Parlamento tendrá lugar, a más tardar, el 31 de diciembre de 2006.

La constitución del Parlamento se realizará a través de las etapas previstas en las Disposiciones Transitorias del presente Protocolo.

⁶⁸¹ Dri, Clarissa/Ventura, Deisy, 2013, p. 78.

⁶⁸² Drummond, Maria Claudia, *Representación Ciudadana en el Parlamento del Mercosur: La Construcción del Acuerdo Político*, in: *Puente Europa*, Year VII, Special Number, December 2009, p. 71 reproduced in Dri, Clarissa/Ventura, Deisy, 2013, p. 83.

⁶⁸³ Data obtained at the PARLASUR's official website at <http://www.parlamentodelmercosur.org>. Date of access: 18th March 2014.

elections by citizens of the MERCOSUR should take place in 2014. Nevertheless, due to the political situation in the respective Member States, a postponement of direct elections is highly possible. This, as a result, would extend the current transitional period. After the transitional period, Brazil should have 75 representatives, Argentina 43, Venezuela 23, Paraguay 18 and Uruguay 18. The PARLASUR elections should be organised according to the domestic laws of each MERCOSUR Member State and the provisions of the parliament's constitutive protocol.⁶⁸⁴ The mandates will be fixed for 4 years, and one re-election is permitted.⁶⁸⁵ Parliamentarians may not hold any other positions of Legislative or Executive nature in their respective countries.⁶⁸⁶

As I have already argued in section 3.1. of this chapter, the Parliament of the MERCOSUR is not one of the bloc's decision-making bodies and, as a consequence, does not have any capacity of making binding decisions either on the MERCOSUR institutions or Member States. For this reason it is more appropriate to say that it has 'functions' rather than 'powers'.⁶⁸⁷ Dri and Ventura classify the PARLASUR as an 'assembly that deliberates' rather than a 'deliberative assembly', because it does not participate in the 'exercise of sovereignty' and its resolutions rarely generate legal

⁶⁸⁴ Art. 6 of the constitutive protocol:

"Elección

1. Los Parlamentarios serán elegidos por los ciudadanos de los respectivos Estados Partes, a través de sufragio directo, universal y secreto.

2. El mecanismo de elección de los Parlamentarios y sus suplentes, se regirá por lo previsto en la legislación de cada Estado Parte, la cual procurará asegurar una adecuada representación por género, etnias y regiones según las realidades de cada Estado.

3. Los Parlamentarios serán electos conjuntamente con sus suplentes, quienes los sustituirán, de acuerdo a la legislación electoral del Estado Parte respectivo, en los casos de ausencia definitiva o transitoria. Los suplentes serán elegidos en la misma fecha y forma que los Parlamentarios titulares, así como para idénticos periodos.

4. A propuesta del Parlamento, el Consejo del Mercado Común establecerá el "Día del MERCOSUR Ciudadano", para la elección de los parlamentarios, de forma simultánea en todos los Estados Partes, a través de sufragio directo, universal y secreto de los ciudadanos."

⁶⁸⁵ Art. 10 of the constitutive protocol:

"Mandato

Los Parlamentarios tendrán un mandato común de cuatro (4) años, contados a partir de la fecha de asunción en el cargo, y podrán ser reelectos."

⁶⁸⁶ Art. 11 of the constitutive protocol:

"Requisitos e incompatibilidades

1. Los candidatos a Parlamentarios deberán cumplir con los requisitos exigibles para ser diputado nacional, según el derecho del Estado Parte respectivo.

2. El ejercicio del cargo de Parlamentario es incompatible con el desempeño de un mandato o cargo legislativo o ejecutivo en los Estados Partes, así como con el desempeño de cargos en los demás órganos del MERCOSUR.

3. Serán aplicables, asimismo, las demás incompatibilidades para ser legislador, establecidas en la legislación nacional del Estado Parte correspondiente."

⁶⁸⁷ Dri, Clarissa/Ventura, Deisy, 2013, p. 78.

effects outside the assembly.⁶⁸⁸ On the other hand, one must note that it has functions that no other MERCOSUR legislative body has ever been granted, namely deliberation, control and legislation. *Dri* and *Ventura* explain that deliberation is one of the functions used most because of its so-called ‘low political cost’.⁶⁸⁹

“Generally speaking, controlling the implementation of the budget by the executive power is more likely to have negative consequences for parliamentarians than making statements or setting up seminars or panel discussions. From the initial number of six in 2007, they went up to 26 in 2008 and levelled off at 14 in 2009, before increasing to 25 in 2010, i.e. an average of 1.7 statements per plenary session. Statements are made on a variety of topics, ranging from the negotiations with the World Trade Organization (WTO) to the question of Argentina’s sovereignty on the Falkland Islands (Malvinas) or environmental and health issues.”⁶⁹⁰

The main purposes of the PARLASUR are representing the peoples of the MERCOSUR with due respect to their ideological and political pluralism, promoting and defending democracy, liberty and peace, supporting sustainable development in the region with social justice and respect to the cultural diversity of its peoples, stimulating the creation of a common conscience on citizens’ and community’s values for a better integration, contributing to consolidate the Latin American integration through further expansion of the MERCOSUR, and promoting regional and international solidarity and cooperation.⁶⁹¹ Therefore, one can say that the general

⁶⁸⁸ *Ibid.*, p. 80. The authors also quoted Costa, Olivier, *Le Parlement européen, assemblée délibérante*, Brussels, Edition de l’Université de Bruxelles, 2001, p. 69.

⁶⁸⁹ *Ibid.*, p. 79.

⁶⁹⁰ *Ibid.*

⁶⁹¹ These purposes are mentioned in Art. 2 of the constitutive protocol of the Mercosur Parliament. The text in Spanish is as follows:

“*Son propósitos del Parlamento:*

1. *Representar a los pueblos del MERCOSUR, respetando su pluralidad ideológica y política.*
2. *Asumir la promoción y defensa permanente de la democracia, la libertad y la paz.*
3. *Impulsar el desarrollo sustentable de la región con justicia social y respeto a la diversidad cultural de sus poblaciones.*
4. *Garantizar la participación de los actores de la sociedad civil en el proceso de integración.*
5. *Estimular la formación de una conciencia colectiva de valores ciudadanos y comunitarios para la integración.*

goal is guaranteeing the participation of civil society actors in the integration process.⁶⁹² According to *Dri* and *Ventura*, however, only a combined analysis of the constitutive protocol plus the rules of procedure of the PARLASUR, rather than just one of them alone, offers a precise understanding of all the parliament's functions (see the table below for this purpose).⁶⁹³

Deliberation	<p>The parliament organises panel discussions and seminars with representatives of civil society, social organisations and productive sectors;</p> <p>The parliament may sign cooperation or technical assistance agreements with public or private bodies. It organises quarterly meetings with the Economic and Social Advisory Forum with a view to exchanging ideas on regional integration;</p> <p>The parliament adopts statements on questions of general interest;</p> <p>The parliament publishes an annual report on the status of human rights in the MERCOSUR countries.</p>
Control	<p>In order to control MERCOSUR bodies, the parliament must:</p> <p>Receive an annual report on the implementation of the budget from the MERCOSUR Secretariat;</p> <p>Receive petitions from natural and legal persons on the acts or omissions of the institutions;</p> <p>Request the MERCOSUR institutions in writing to deliver information within 180 days;</p> <p>Invite institutional representatives to debate on the integration process;</p> <p>Invite the authorities of the MERCOSUR rotating presidency at the end of each quarter to submit their annual plan of work and an evaluation of the measures undertaken;</p> <p>Request advice from the MERCOSUR Permanent Court of Review.</p>
Legislation	<p>The parliament has the following normative instruments:</p> <p>Opinions: formal opinions on proposals for legislation submitted by the CMC. If the parliament delivers a favourable opinion, there is a fast-track procedure in national congresses;</p> <p>Bills: proposals for legislation submitted to the CMC;</p>

6. Contribuir a consolidar la integración latinoamericana mediante la profundización y ampliación del MERCOSUR.

7. Promover la solidaridad y la cooperación regional e internacional.”

⁶⁹² Bonzon, Yves, *Options for Public Participation in the WTO: Experience from Regional Trade Agreements*, in: Steger, Debra P. (Ed.), *Redesigning the World Trade Organization for the twenty-first century*, Ottawa, The Centre for International Governance Innovation (CIGI) and Wilfrid Laurier University Press, 2010, p. 292.

⁶⁹³ The table is a revised version of the one organised by Clarissa Dri and Deisy Ventura. Their table can be found in Dri, Clarissa/Ventura, Deisy, 2013, p. 78.

	<p>Draft bills: drafts are submitted to national congresses with a view to standardising legislation in the Member States;</p> <p>Recommendations: propositions and suggestions to the MERCOSUR decision-making bodies;</p> <p>Reports: reports on specific questions prepared by the parliament commissions;</p> <p>Provisions: rules concerning the internal functioning of the parliament.</p>
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Even though most of the populations of the MERCOSUR countries are unaware of the parliament as well as its conclusions and propositions as a result of a lack of publicity of its activities and a general ignorance about the MERCOSUR among citizens, the PARLASUR can be regarded as a kind of response to the democratic deficit that exists in the MERCOSUR. It clearly seems to have been created in order to deepen the integration in social and political terms. *Bonzon* enlightens that the Parliament can even:

“receive, examine, and, if appropriate, transmit to the decision-making organs petitions of any individual of the States Parties, natural or juridical person, relating to acts or omissions of MERCOSUR organs.”⁶⁹⁴

Thus, PARLASUR goes even further beyond the trade aspect and has taken another institutional step that has also been taken in the European integration process. The integration process that took place in Europe started with a purely economic community and evolved into a political union with several policy areas.⁶⁹⁵ From 2007 to 2009, the MERCOSUR Parliament adopted more than 170 legislative acts at an average of 6 per plenary session (the types of legislative acts that exist can be found in the last line of the table), a legislative production that is higher than the one of the Joint Parliamentary Commission.⁶⁹⁶ Since its installation, however, the PARLASUR has been unsuccessful in exercising most of its functions. While it took more than half a century for the European Parliament to reach its current policy-making position, *Dri* argues that “the European assemblies of 1952 and 1957 already had more powers than

⁶⁹⁴ Bonzon, p. 292. Bonzon’s source of information is PARLASUR’s constitutive protocol.

⁶⁹⁵ *Ibid.*

⁶⁹⁶ Dri, 2009, p. 87.

the MERCOSUR Parliament has today.”⁶⁹⁷ This problem results not only from the current advisory status of the Parliament, but mostly from the decision-making bodies of the Common Market of the South, which have never concretely assessed the Parliament’s normative acts.⁶⁹⁸ While recommendations and proposals for legislation to the CMC, for instance, have never produced practical effects, the CMC has never requested any opinions either.⁶⁹⁹ Furthermore, although the parliament’s constitutive protocol has provisions that establish a maximum period of 6 months for the CMC to respond to PARLASUR requests concerning the supply of information, the CMC has never responded to such requests.⁷⁰⁰⁻⁷⁰¹

As *Dri* and *Ventura* explain:

“Though the assembly has increasingly used its normative acts, its lack of competences and autonomy vis-à-vis the national powers has limited its institutional development.”⁷⁰²

In the years 2011 and 2012, there were no plenary sessions, but they started taking place again in 2013. There are two reasons why no sessions were held during two consecutive years. Firstly, the Brazilian delegation was delayed in indicating its representatives after the Brazilian legislative elections of the year 2010. Secondly, both the delegations of Paraguay and Uruguay argued later on that parliamentary activities with due proportional representation could only take place after reforming the rules of procedure.⁷⁰³

⁶⁹⁷ Dri, 2009, p. 90.

⁶⁹⁸ Dri, Clarissa/Ventura, Deisy, 2013, p. 80.

⁶⁹⁹ *Ibid.*, p. 80.

⁷⁰⁰ *Ibid.*, pp. 80-81.

⁷⁰¹ This is the original text of Art. 4, section 4:

“*Artículo 4*

Competencias

El Parlamento tendrá las siguientes competencias:

(...)

4. *Efectuar pedidos de informes u opiniones por escrito a los órganos decisorios y consultivos del MERCOSUR establecidos en el Protocolo de Ouro Preto sobre cuestiones vinculadas al desarrollo del proceso de integración. Los pedidos de informes deberán ser respondidos en un plazo máximo de 180 días.*”

⁷⁰² Dri, Clarissa/Ventura, Deisy, 2013, p. 81.

⁷⁰³ *Ibid.*, pp. 84-85.

The institutionalisation of the PARLASUR has still not been completed. If the MERCOSUR Parliament was really created to democratise and strengthen the integration process, it cannot remain shackled as a consequence of a limited institutionalisation, which, as a result, hinders its potential autonomy. With respect to that, one must point out that, differently from the EU Member States, the MERCOSUR Member States have strong presidential regimes that can be considered “not ready to come to terms with the emergence of a strong and autonomous regional legislative power”.⁷⁰⁴ It is actually unusual – even paradoxical, one could argue – that countries without parliamentary systems⁷⁰⁵ install a ‘parliament’ in a regional intergovernmental bloc. Hence, it is unsurprising that the PARLASUR is not quite working as it should. On the other hand, direct elections by the citizens of the MERCOSUR Member States may change this scenario, as parliamentarians exclusively for the PARLASUR – i.e., not selected by the national congresses among their respective congressmen and congresswomen – may be more independent from the phenomenon of subordination of national congresses in coalitional presidential regimes.⁷⁰⁶ This phenomenon, which is typical in Latin America,⁷⁰⁷ results from coalitions among political parties (one of the parties is always the one of the President of the country), exchange of interests between the Executive and Legislative Powers and even a distribution of ministries among politicians of the parties in coalition. It is an imperial presidentialism, one could argue, because it clearly disrespects the division of powers. With regard to Brazil, there is even a proverb about this matter: the ‘wife’ of the President of the Republic is the President of the National Congress. This ‘marriage’ makes it easy for leaders of the Executive to influence the deliberations of the Legislative.

e. The *Tribunal Permanente de Revisión* (TPR)

Before beginning the examination of the TPR, I consider it important to explain the composition of MERCOSUR *Ad Hoc* arbitral tribunals. Member States set up *Ad Hoc*

⁷⁰⁴ *Ibid.*, p. 77.

⁷⁰⁵ All Mercosur Member States are presidentialist republics.

⁷⁰⁶ Dri, Clarissa/Ventura, Deisy, 2013, p. 86.

⁷⁰⁷ For details, see Malamud, Andrés, *O presidencialismo na América do Sul: Argentina e Brasil em perspectiva comparada*, in: *Análise Social*, Vol. 168, 2003.

tribunals by choosing three arbitrators from a list that must have been previously submitted to the MERCOSUR Administrative Secretariat. This procedure takes place on a case-by-case basis and each Member State has to appoint one arbitrator. The third arbitrator must be from a Member State that is not involved in the case and selected by mutual agreement. This third arbitrator is also the one to chair the tribunal. Articles 10 and 11 of the Protocol of Olivos provide more details.

“Article 10

Composition of the Ad Hoc Arbitration Court

1. The arbitration procedure will be held before an Ad Hoc Court formed by three (3) arbitrators.

2. The arbitrators will be appointed as follows:

i) Each State party to the dispute shall appoint one (1) arbitrator from the list provided in Article 11.1 within fifteen (15) days of the communication of the MERCOSUR Administrative Secretariat to the States parties to the dispute of the decision taken by one of them to resort to arbitration.

At the same time and from the same list, one (1) alternate will be appointed to replace an arbitrator in the event of his inability to act or of excusing himself during any stage of the arbitration procedure.

ii) If a State party to the dispute fails to appoint the arbitrators within the period specified in section 2 i) the arbitrators will be appointed by the MERCOSUR Administrative Secretariat and selected by random drawing, within two (2) days after such period expired, from among the respective State's arbitrator list pursuant to Article 11.1.

3. The Presiding Arbitrator will be chosen as follows:

i) The States involved in the dispute will agree on a third arbitrator from the list included in Article 11.2 iii) within fifteen days as from the date on which the MERCOSUR Administrative Secretariat has communicated to the States involved in the dispute the decision taken by one of them to submit to arbitration. The third arbitrator will preside over the Ad Hoc Arbitration Court.

The States will simultaneously appoint, from the same list, an alternate to replace an arbitrator in case of his inability to act or of his excluding himself during any stage of the arbitration proceedings.

The Presiding Arbitrator and the alternate shall not be nationals of the States parties to the dispute.

ii) If the States parties to a dispute are unable to reach an agreement on appointing a third arbitrator within the specified period, the MERCOSUR Administrative Secretariat, at the request of any of them, will appoint such arbitrator by random drawing of the names on the list included in Article 11.2 iii), excluding all nationals of the States parties to the dispute.

iii) The individuals appointed to act as third arbitrators shall answer within three (3) days from the date of notification of their appointment whether they accept to act as such in the dispute.

4. The MERCOSUR Administrative Secretariat shall notify the arbitrators of their appointment.”⁷⁰⁸

“Article 11

Arbitrator Lists

1. Each State Party shall nominate twelve (12) arbitrators to be included in a list filed with the MERCOSUR Administrative Secretariat. The nomination of the arbitrators, together with a detailed curriculum vitae of each one, shall be notified simultaneously to the other States Parties and to the MERCOSUR Administrative Secretariat.

i) Within thirty (30) days of the notice, each of the States Parties may request additional information on the individuals appointed to the above-mentioned list by the other States Parties.

ii) The MERCOSUR Administrative Secretariat shall notify the States Parties of the consolidated list of MERCOSUR arbitrators, as well as of any subsequent modification thereof.

⁷⁰⁸ Carvalho, Luciana, *An Introduction to the English Version of MERCOSUR Treaty and Protocols*, in: Franca Filho, Marcílio et al, 2010, pp. 458 f.

2. Each State Party shall further indicate four (4) candidates for the list of third arbitrators. At least one of the arbitrators nominated by each State Party for the list shall not be a national of any of the MERCOSUR States Parties.

i) The list shall be notified to the other States Parties through the Rotating Presidency, together with the curriculum vitae of each of the candidates.

ii) Within thirty (30) days from the notification, each of the States Parties may ask for additional information on the individuals nominated by each of the other States Parties or provide grounds for objecting the candidates in accordance with the criteria established in Article 35.

The objections shall be communicated through the Rotating Presidency to the nominating State Party. If no solution is found within thirty (30) days as of the notice of objection, objection shall prevail.

iii) The consolidated list of third arbitrators and any subsequent modifications, together with the curriculum vitae of the arbitrators, shall be communicated by the Rotating Presidency to the MERCOSUR Administrative Secretariat. The Secretariat shall be the depositary of the list and shall notify the States Parties.”⁷⁰⁹

The MERCOSUR has had since 2004 a permanent court: the *Tribunal Permanente de Revisión* (TPR) – the ‘Permanent Court of Review’, in English. Established in 2004 in the city of Asunción, the TPR was created in 2002 by the Protocol of Olivos⁷¹⁰ and is nowadays the highest instance in the dispute settlement mechanism of the MERCOSUR.

The role of the TPR was initially to provide examinations of decisions of the *Ad Hoc* arbitral tribunals⁷¹¹ when a MERCOSUR Member State requests it to do so⁷¹² and

⁷⁰⁹ *Ibid.*, p. 459.

⁷¹⁰ ‘*Protocolo de Olivos*’ of 18th February 2002, in force since 2004.

⁷¹¹ Art. 17 (2) in conjunction with Art. 22 (1) of the Protocol of Olivos. Revisions of *Ad Hoc* arbitral tribunal decisions became possible through the Council decision 37/03 of 15th December 2003.

⁷¹² Art. 17 (1) of the Protocol of Olivos.

also work both as court of first and last instances.⁷¹³ On the other hand, one may argue that the possibility of the TPR working as a court of first instance is contradictory, as the court takes the position of an *Ad Hoc* arbitral tribunal, and parties, as a result, lose the opportunity to review the decision.⁷¹⁴

Although the creation of the TPR has been much celebrated because of the innovations that it brought to the MERCOSUR dispute settlement mechanism and its potential to promote legal certainty, there is a group that criticises its creation. Their main argument is that a permanent court is inconsistent with the arbitration system.⁷¹⁵

In December 2005, the first arbitration award of the TPR concerning an appeal was passed. It is a trend-setting arbitral verdict: *Laudo* 1/2005 of 20th December 2005. The several references to jurisprudence of the European Court of Justice (ECJ)⁷¹⁶ in this award are especially interesting and it can be assumed that the TPR is going to play an important role in the integration process of the MERCOSUR. But what about the character of the TPR? Is it intergovernmental or not? I personally defend that it is not intergovernmental. Nonetheless, given that this is a highly debatable issue, the next subsection⁷¹⁷ focuses specifically on it.

Two years after its first award, the TPR was invoked in 2007 for the first time as a court of first instance (*Laudo* 1/2007 of 8th June 2007) in order to adjudicate upon the non-fulfilment of two verdicts (*Laudo* 1/2005 and *Laudo Aclaratorio* 1/2006), all three involving Argentina and Uruguay.

Furthermore, the MERCOSUR Permanent Court of Review can also issue an advisory opinion – entitled *Opinión Consultiva* – which corresponds to the preliminary ruling

⁷¹³ Art. 23 of the Protocol of Olivos.

⁷¹⁴ For details, see Art. 23 (1) of the Protocol of Olivos.

⁷¹⁵ Accioly, Elizabeth, *Sistema de solução de controvérsias em blocos econômicos: contributo para o sistema permanente de solução de controvérsias do Mercosul*, Coimbra, 2004, p. 53; and Accioly, Elizabeth, *O atual mecanismo de solução de controvérsias no Mercosul: o Protocolo de Olivos*, In: Menezes, Wagner (Ed.), *O direito internacional e o direito brasileiro: homenagem a José Francisco Rezek*, Ijuí, 2004, p. 370 ff, both quoted in Zanoto, Josianne, p. 26 f.

⁷¹⁶ Since the entry into force of the Treaty of Lisbon, the European Court of Justice and its acronym 'ECJ' are known as 'Court of Justice of the European Union' and 'CJEU', respectively. In this thesis, both acronyms are used separately and together (ECJ/CJEU), depending on the context involved, also in footnotes.

⁷¹⁷ I.e., 'TPR: Intergovernmental or Supranational?'

of the ECJ/CJEU. In the MERCOSUR, advisory opinions are for issues relating to the validity and interpretation of MERCOSUR law but, differently from preliminary rulings in the EU, they have no binding effect. These advisory opinions may be requested by all the Member States of the MERCOSUR together, the MERCOSUR decision-making bodies and independently by each of the Member States' highest courts.

In January 2007, advisory opinions were regulated in more detail.⁷¹⁸ Accordingly, only the highest courts of the Member States or national courts designated by the respective highest courts are entitled to request advisory opinions. The demand for the request may, however, originate from any national court. In this case, the request will firstly be made to the highest national court, which may or may not forward it to the TPR. Whatever the case may be, there is no obligation for any national court to request advisory opinions.

Although the Protocol of Olivos does not restrict the competences of *Ad Hoc* arbitral tribunals themselves, there is a problem with respect to its Art. 17 (3), which specifies that the awards of the *Ad Hoc* courts based on *ex aequo et bono* principles shall not be subject to review.⁷¹⁹ Given that private parties cannot directly defend their interests before any court of the MERCOSUR and *ex aequo et bono* – i.e. equity – is difficult to define completely, it becomes very complicated to achieve a common sense of what might be regarded as just. Even so, the procedure of Art. 17 (3) of the Protocol of Olivos is in accordance with Art. 33 (2) of the United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules.⁷²⁰

As a permanent body, the TPR has a permanent secretariat.⁷²¹ Its arbitrators are elected for different periods of time (i.e., terms),⁷²² but they only meet when legal

⁷¹⁸ For details, see Common Market Council Decision Nr. 02/07.

⁷¹⁹ Art. 17 (3) of the Protocol of Olivos: *Los laudos de los Tribunales Ad Hoc dictados en base a los principios ex aequo et bono no serán susceptibles del recurso de revisión.*

⁷²⁰ Art. 33 (2): The arbitral tribunal shall decide as *amiable compositeur* or *ex aequo et bono* only if the parties have expressly authorised the arbitral tribunal to do so and if the law applicable to the arbitral procedure permits such arbitration.

⁷²¹ Art. 35 of the regulations of the Protocol of Olivos.

⁷²² The TPR shall be made up of five arbitrators. While each Member State shall appoint one arbitrator and an alternate for a term of two years renewable for a maximum of two consecutive terms, the fifth arbitrator shall be appointed for a non-renewable three-year term, unless otherwise agreed to by the

actions are brought to the court. Nevertheless, judges must always be at the courts' disposal from the time they are elected until the stipulated end of their term.⁷²³ In practice, the *Tribunal Permanente de Revisión* is composed of five arbitrators. While each of the four Member States of the MERCOSUR has to nominate one arbitrator to serve for a two-year term, which can be renewed for two consecutive terms, the fifth arbitrator has a term of three years and must be appointed by mutual agreement. Unless otherwise decided by the Member States, the three years term of the fifth arbitrator cannot be renewed.⁷²⁴ Moreover, the composition of the Permanent Court of Review in disputes is not fixed, but depends on the number of Member States involved in each dispute. Consequently, the court has three arbitrators in disputes where the parties consist of two countries and three arbitrators plus a chairperson in disputes involving more than two Member States as parties. Since the start of its operations in 2004, the TPR has delivered 7 *Laudos*, 3 advisory opinions and 4 *Resoluciones*.⁷²⁵ The cases have concerned prohibition of imports, problems involving the free transit of people and goods across bridges linking Argentina and Uruguay due to the presence of activists,⁷²⁶ disputes concerning the enforcement of a TPR decision, and, with regard to the advisory opinions, the interpretation of MERCOSUR norms in cases before courts of Paraguay (*Opinión Consultiva* Nr. 1/2007) and Uruguay (*Opinión Consultiva* Nr. 1/2008 and *Opinión Consultiva* Nr. 1/2009). Thus, Argentina and Uruguay have been the most active parties.⁷²⁷

The TPR has no hierarchical relationship with the three other decision-making bodies of the MERCOSUR (CMC, GMC and CCM). The legal basis of the TPR can be found in the Protocol of Olivos. The Permanent Court of Review is the main innovation of this Protocol, since it is the first permanent arbitral tribunal in the bloc

Member States, and shall be chosen unanimously by the Member States at least three months before the end of the term of the previous fifth arbitrator in office. For more details, see Art. 18 of the Protocol of Olivos.

⁷²³ Art. 19 of the Protocol of Olivos.

⁷²⁴ For more details, see the previous two footnotes.

⁷²⁵ For up-to-date information, please consult http://www.tprmercosur.org/pt/sol_controversias.htm. Date of access: 24th May 2012.

⁷²⁶ *Laudo* Nr. 02/2006 (review, *Argentina v. Uruguay*).

⁷²⁷ All the 7 *laudos* involved Argentina and Uruguay, advisory opinion Nr. 1/2008 involved Uruguayan private parties and the Uruguayan Ministry of Economy and Finance, and advisory opinion Nr. 1/2009 involved a an Uruguayan private party and again the Uruguayan Ministry of Economy and Finance, besides other public entities of the country.

with the purpose of ensuring uniform interpretation of MERCOSUR law. *Ad Hoc* arbitral tribunals cannot do this because they are not bound by any previous decisions.

Two major differences between the TPR and the ECJ/CJEU are the fact that the TPR does not allow direct access for private parties and, although it is the first permanent court of the MERCOSUR, its arbitrators do not meet regularly, but merely remain at the courts' disposal. Therefore, the composition of the TPR is more like the composition of a WTO panel.

Awards of the Permanent Court of Review are not subject to appeal, are binding on the States which are parties to the dispute from the time of notice, and are deemed to be effective between the parties as *res judicata*.⁷²⁸ The awards are to be enforced in the form and within the scope established therein, and the adoption of compensatory measures pursuant to the terms of the Protocol of Olivos does not release the Member State from its obligations to enforce the award.⁷²⁹ Any of the States involved in the dispute may, within 15 days of notification, request clarification on the award issued by the *Ad Hoc* arbitral tribunal or the Permanent Court of Review and clarification on the way the award is to be enforced.⁷³⁰ The competent court is required to make a decision on the request within 15 days of the filing of such request, and may extend the term established for enforcement of the award.⁷³¹ The awards of the *Ad Hoc* arbitral tribunals or of the Permanent Court of Review, as the case may be, are to be enforced within the period established by the respective court, but, if no period has been determined, the awards are required to be enforced within 30 days of the date of notification.⁷³² If a State party files a request for review, the enforcement of the award

⁷²⁸ Art. 26 (2) of the Protocol of Olivos.

⁷²⁹ Art. 27 of the Protocol of Olivos:

“Los laudos deberán ser cumplidos en la forma y con el alcance con que fueron dictados. La adopción de medidas compensatorias en los términos de este Protocolo no exime al Estado parte de su obligación de cumplir el Laudo.”

⁷³⁰ Art. 28 (1) of the Protocol of Olivos:

“Cualquiera de los Estados partes en la controversia podrá solicitar una aclaración del laudo del Tribunal Arbitral Ad Hoc o del Tribunal Permanente de Revisión y sobre la forma en que el laudo deberá cumplirse, dentro de los quince (15) días siguientes a su notificación.”

⁷³¹ Art. 28 (2) of the Protocol of Olivos:

“El Tribunal respectivo se expedirá sobre el recurso dentro de los quince (15) días siguientes a la presentación de dicha solicitud y podrá otorgar un plazo adicional para el cumplimiento del laudo.”

⁷³² Art. 29 (1) of the Protocol of Olivos:

“Los laudos de los Tribunales Ad Hoc o los del Tribunal Permanente de Revisión, según el caso, deberán ser cumplidos en el plazo que los respectivos tribunales establezcan. Si no se determinara un

of the *Ad Hoc* arbitral tribunal is suspended while such a request is pending.⁷³³ The State party that has to enforce the award is required, within 15 days of notification, to inform the other party to the dispute as well as the Common Market Group, through the MERCOSUR Administrative Secretariat, of the measures it shall take to enforce the award.⁷³⁴

The TPR might be the cornerstone of a future MERCOSUR Court of Justice or the basis of a completely new legal system. In the event that the former happens, it is highly likely that the model to be adopted will be the CJEU one. However, for such an important development in the integration process of the MERCOSUR to take place, national politics will have to actively cooperate too. For *Jorge Fontoura*, who is an arbitral judge and the current president of the TPR, supranationality can, of course, be useful for the MERCOSUR and, on each occasion on which integration is discussed, the EU integration model is discussed too. A step towards supranationality, however, depends on the bloc's national governments,⁷³⁵ which had constantly rejected the creation of a supranational court.⁷³⁶ *Fontoura* is, in principle, not in favour of a supranational court and pointed out that even the WTO dispute settlement system does not have supranational status. He has also already written that the TPR is collegiate, appellate and compulsory like the WTO Appellate Body, being, therefore, different from courts of the EU and its Andean mimesis.⁷³⁷ In spite of this, even if the TPR one day becomes a supranational court, this will not be sufficient, as the access of private parties to the court has to be permitted as well.

plazo, los laudos deberán ser cumplidos dentro de los treinta (30) días siguientes a la fecha de su notificación.”

⁷³³ Art. 29 (2) of the Protocol of Olivos:

“En caso que un Estado parte interponga el recurso de revisión el cumplimiento del laudo del Tribunal Arbitral Ad Hoc será suspendido durante la sustanciación del mismo.”

⁷³⁴ Art. 29 (3) of the Protocol of Olivos:

“El Estado parte obligado a cumplir el laudo informará a la otra parte en la controversia así como al Grupo Mercado Común, por intermedio de la Secretaría Administrativa del MERCOSUR, sobre las medidas que adoptará para cumplir el laudo, dentro de los quince (15) días contados desde su notificación.”

⁷³⁵ Personal notes from his speech addressing the issue of ‘*A influência do presidencialismo e do parlamentarismo nos sistemas de integração regional*’ on 6th December 2011 at the international conference ‘*A União Europeia e o Mercosul: relações presentes e futuras*’, which took place from 5 to 7 December 2011 at the Faculty of Law of the University of Lisbon, in Portugal.

⁷³⁶ For more details, please see the section of this thesis entitled ‘Access to Justice in the Mercosur’, which is part of the chapter on the Mercosur.

⁷³⁷ *Fontoura, Jorge, Uma perspectiva do Protocolo de Brasília à luz das inovações contidas no Protocolo de Olivos*, in: Menezes, Wagner (Ed.), *Direito internacional e o direito brasileiro: homenagem a José Francisco Rezek*, Ijuí, 2004, p. 356, quoted in Zanoto, Josianne, p. 31.

e.a. TPR: Intergovernmental or Supranational?

As mentioned in the section above, I believe that the TPR is not an intergovernmental institution. In order to explain this point of view, the methodology will be focusing on the EC/EU experiences with its ECJ and afterwards on the MERCOSUR and its TPR through a historic and comparative law approach.

Supranationality, as I have already argued in Chapter I, was born with the European Coal and Steel Community, namely when its Member States – i.e., Belgium, France, West Germany, Italy, Luxembourg and the Netherlands – decided to delegate the administration of a common economic sector in their respective national economies to a community of countries. With regard to the EU, although it is defined as a supranational organisation, it also has intergovernmental institutions. Ventura⁷³⁸ and Pfetsch⁷³⁹ argue that the European Commission, European Parliament, ECJ/CJEU, European Council, EU Council of Ministers and EU Economic Policy Committee are simultaneously supranational and intergovernmental institutions. Pfetsch⁷⁴⁰ stresses, though, that the communitarian institutions – especially the Parliament, Commission, Council, European Central Bank and ECJ/CJEU – highlight the supranational character of the EU. Nonetheless, the situation concerning supranationality at the ECJ/CJEU was different, as it had to develop the principles of direct effect, primacy, legal certainty, subsidiarity, direct application within the territory of a Member State,⁷⁴¹ and the obligation to make reparation for breach of community law.⁷⁴² Although these principles were not foreseen in treaties (i.e., they were unwritten), they created new rights and obligations to the Member States and their citizens, and

⁷³⁸ Ventura, Deisy, *As assimetrias entre o Mercosul e a União Européia: os desafios de uma associação inter-regional*, Barueri, Editora Manole, 2003, p. 101 f.

⁷³⁹ Pfetsch Frank R., *A União Européia: história, instituições, processos* (translated by Estevão C. de Rezende Martins), Brasília, 2001, p 119 f. (original book: Pfetsch, Frank R., *Die Europäische Union: eine Einführung*, München, 1997).

⁷⁴⁰ Pfetsch, p. 120.

⁷⁴¹ Direct application is called ‘*interne werking*’ in Dutch and was called into question by a Dutch court in *Van Gend en Loos*. The national court requested a preliminary ruling to the ECJ, which was asked to clarify whether or not Art. 12 of the Treaty of Rome conferred rights on natural and legal persons of Member States and whether or not these rights could be enforced before national courts.

⁷⁴² Jaeger Junior, Augusto, *Liberdade de Concorrência na União Européia e no Mercosul*, São Paulo, Editora LTr, 2006, p. 82.

acquired own enforceable power.⁷⁴³ According to *Jaeger Junior*,⁷⁴⁴ the definition and basis for the recognition of the primacy of community law resulted from jurisprudence, as it was not included in the treaties. He also lists three ECJ cases that may be considered paradigmatic,⁷⁴⁵ namely *Humblet v Belgium* of 1960,⁷⁴⁶ *Van Gend en Loos* of 1963⁷⁴⁷ and *Costa v ENEL* of 1964,⁷⁴⁸ and argues that the supremacy of the law of the European Communities has been sought and constructed in a slow, progressive and jurisprudential manner.⁷⁴⁹ In the words of *Bogdandy*,

“It is – correctly – a general custom in legal science to mark the “real beginning” of Community law with the van Gend & Loos and Costa/E.N.E.L. decisions, because the direct effect and primacy doctrines are the most important concretizing legal doctrines of the principle of equal liberty.”⁷⁵⁰

With respect to the meaning of *Bogdandy*’s expression ‘equal liberty’, it is worth referring to what *Rawls* says about it in his first principle of justice:

“First Principle

Each person is to have an equal right to the most extensive total system of equal basic liberties compatible with a similar system for all.

Priority Rule

The principles of justice are to be ranked in lexical order and therefore liberty can be restricted only for the sake of liberty. There are two cases: (a) a less extensive liberty must strengthen the total system of

⁷⁴³ *Ibid*, p. 83.

⁷⁴⁴ *Ibid*, p. 84.

⁷⁴⁵ *Ibid*, p. 85.

⁷⁴⁶ Judgment of 16th December 1960, Case 6/60 *Humblet v Belgium* [1960], European Court Reports, p. 569.

⁷⁴⁷ Judgment of 5th February 1963, Case 26/62 *Van Gend en Loos* [1963], European Court Reports, p. 1

⁷⁴⁸ Judgment of 15 July 1964, Case 6/64 *Costa v ENEL* [1964], European Court Reports, p. 585.

⁷⁴⁹ *Jaeger Junior*, p. 84.

⁷⁵⁰ *Bogdandy, Armin von, Doctrine and Principles*, in: NYU School of Law, *Jean Monnet Working Paper* 9/03, New York, 2003, p. 41, to be found at <http://centers.law.nyu.edu/jeanmonnet/archive/papers/03/030901-01.pdf> . Date of access: 17th August 2012.

liberty shared by all, and (b) a less than equal liberty must be acceptable to those citizens with the lesser liberty.”⁷⁵¹

As a result, it can be argued that it is about the notion of a basic liberty and what makes a liberty basic. Yet, *Ladenson* criticizes *Rawls* when he sustains that:

“Rawls provides almost no explicit guidance on this matter, his only remarks with respect to it occurring in the following passage:

*The basic liberties are, roughly speaking, political liberty (the right to vote and to be eligible for public office) together with freedom of speech, and assembly; liberty of conscience and freedom of thought; freedom of the person along with the right to hold (personal) property; and freedom from arbitrary arrest and seizure as defined by the concept of the rule of law.*⁷⁵²

This gives us a fairly good idea of the sorts of things that Rawls would include under the concept of basic liberty, but being merely a list, it fails to explain what it is that makes these liberties basic in the relevant sense. It might be urged that a list of the above sort is sufficient for Rawls’ purposes since it serves to indicate some of the important liberties to which he refers in using the phrase ‘basic liberty’.”⁷⁵³

Ladenson also argues that “the idea that liberty can only be restricted for the sake of liberty makes sense to us only if we understand how the term ‘liberty’ is being used”.⁷⁵⁴ He also defends that “there exists no standard philosophical defense of the basic liberties”.⁷⁵⁵

Concerning the MERCOSUR and its TPR, it can be said that MERCOSUR’s fundamental freedoms of free movement of goods, services and factors of production

⁷⁵¹ Rawls, John B., *A Theory of Justice*, Oxford, Oxford University Press, 1971, p. 250.

⁷⁵² Rawls, 1971, p. 250, quoted in Ladenson, Robert F., *Rawls’ Principle of Equal Liberty*, in: *Philosophical Studies: An International Journal for Philosophy in the Analytic Tradition*, Vol. 28, Nr. 1 (July 1975), p. 50.

⁷⁵³ Ladenson, pp. 49 f.

⁷⁵⁴ *Ibid*, p. 50.

⁷⁵⁵ *Ibid*, p. 52.

between its Member States⁷⁵⁶ must be understood as ‘equal liberties’ of all actors involved in the bloc’s integration process. These actors are not only the governments of the Member States but also the natural and legal persons of them, because most of the ‘goods’, ‘services’ and ‘factors of production’⁷⁵⁷ are generated by private parties rather than public parties. On the other hand, ‘equal liberties’ also imply ‘equal obligations’, that is to say, ‘equal liberties’ may only exist if States reciprocally accept and protect every one of these liberties or there is an independent guardian for them. Due to the problems concerning the national legal systems, especially the ones of Brazil and Uruguay, besides the role that politics play in every Member State, the latter might be less complicated to achieve. This independent guardian could well be the TPR, because the fact that the MERCOSUR is not a supranational organisation does not prevent the TPR from creating its own supranational nature. Furthermore, it is worth emphasising that the Protocol of Olivos, which created the TPR and could in theory obstruct such a development, does not specify whether it is an intergovernmental or a supranational court and, even though it has no compulsory jurisdiction (i.e., parties can choose an *Ad Hoc* arbitral tribunal or even the WTO), parties agree to accept the *laudos* of the TPR. It also has to be noted that the mandatory nature of the arbitral awards issued in accordance with the MERCOSUR dispute settlement mechanisms – i.e., subject to the rules of both the former Protocol of Brasília and the rules of the current Protocol of Olivos – created an ‘embryo of supranationalism’,⁷⁵⁸ for the reason that decisions must be enforced irrespective of the wills of the States.

While it is correct that, based on the Protocol of Ouro Preto, the Common Market Group may be considered the guardian of the Treaty of Asunción and secondary

⁷⁵⁶ Art. 1 of the Treaty of Asunción.

⁷⁵⁷ ‘Factors of production’ have to be understood as ‘capital and labour’, which mean ‘free movement of workers and capital’ and, thus, also the ‘right of establishment’ as fundamental freedoms. This interpretation follows the analysis of Elaine Ramos da Silva in her book *Rechtsangleichung im Mercosul: Perspektiven für das Niederlassungsrecht von Gesellschaften anhand von Erfahrungen in der Europäischen Union* (Baden-Baden, 2002, p. 37), who also quotes the following publications: Jaeger Junior, Augusto, *MERCOSUL e a livre circulação de pessoas*, São Paulo, 2000, p. 116 ff; Faria, José Ângelo Estrella, *O Mercosul: Princípios, Finalidade e Alcance do Tratado de Assunção*, Brasília, 1993, p. 41; Salomão Filho, Calixto/Samtleben, Jürgen, *Der Südamerikanische Gemeinsame Markt – eine rechtliche Analyse des MERCOSUR*, in: *Wertpapier-Mitteilungen (WM)*, 1992, Nr. 33, p. 1342.

⁷⁵⁸ The expression in Portuguese used by André F. dos Reis Trindade is ‘*germe da supranacionalidade*’. ‘Germe’ means germ – i.e., a microbe. But, given that this germ is in my view something positive, I prefer to use the English word ‘embryo’, as it has no negative connotation. For details, see Trindade, André F. dos Reis, *Tribunais do Mercosul*, in: *Revista Justiça do Direito*, Passo Fundo, Nr. 15, Vol. II, 2001, p. 390, quoted in Zanoto, Josianne, p. 25.

law,⁷⁵⁹ one must bear in mind that the Protocol of Ouro Preto dates back to the year 1994 and the TPR was created through the Protocol of Olivos of 2002. Furthermore, the Common Market Group is neither impartial nor independent, as it is composed of members who represent the Ministries of Economics and Foreign Affairs of each signatory State as well as members of their respective national central banks. Thus, the TPR is more suitable to perform the role of an independent guardian of MERCOSUR law. As *Petersmann* explains, international courts established by multilateral treaty systems – e.g., the CJEU, ICJ and EFTA Court, among others – clarify and progressively develop incomplete or indeterminate treaty rules.⁷⁶⁰ While it can be said that the TPR does not have a supranational character at this point, it can also be concluded that it is not confined in an intergovernmental one either. According to *Lorentz*, while the group that defends supranationality underlines that a supranational court is essential for the further development of the MERCOSUR, the group that defends intergovernmentalism believes that an intergovernmental body is the best choice for the current phase of the bloc.⁷⁶¹ I am personally in favour of a supranational court, as I believe that in the end only a supranational court may create and protect equal liberties for private persons at MERCOSUR level. One also has to think about what, in the long run, the TPR is supposed to protect. If it should protect only State interests, one may argue that it is and should remain a purely intergovernmental body. If, nonetheless, the TPR does also protect the interests of private persons, one may argue that it does have some degree of supranationalism.

5. Interim Balance of the MERCOSUR

The MERCOSUR supports trade, peace, democracy and stability between Argentina, Brazil, Paraguay, Uruguay and, since 2012, also Venezuela. This process started with the Treaty of Asunción in 1991 and by the end of 1994 approximately 90% of the

⁷⁵⁹ For details, see the section named ‘The Common Market Group (GMC)’ in this thesis and Art. 14 (I) of the Treaty of Ouro Preto.

⁷⁶⁰ Petersmann, Ernst-Ulrich, *Introduction and Summary: ‘Administration of Justice’ in International Investment Law and Adjudication?*, In: Dupuy, Pierre-Marie/Francioni, Francesco/Petersmann, Ernst-Ulrich (Eds.), *Human Rights in International Investment Law and Arbitration*, New York, Oxford University Press, 2009, p. 38.

⁷⁶¹ Lorentz, Adriane Cláudia Melo, *Supranacionalidade no Mercosul: a doutrina, os governos, a Constituição Federal e os tratados de integração*, Curitiba, 2001, p. 16, quoted in Zanoto, Josianne, p. 24.

internal customs for trade within the region made of Argentina, Brazil, Paraguay and Uruguay had been abolished.⁷⁶² The MERCOSUR also strengthened cooperation in several areas among its Member States both inside and outside the bloc. In addition, the MERCOSUR's political dimension has gained more importance over recent years and this can *inter alia* be illustrated by a sequence of summit meetings that took place after the signing of the Protocol of Olivos in 2002. A series of improvements has also been achieved since 2002. These include the growth of the customs union, the institutional structure, and the common market in general. Examples include the *Comisión de Representantes Permanentes* – CPMR, which is a steering committee established in 2003 and based on the model of the Committee of Permanent Representatives of the European Union (the *Comité des représentants permanents* – COREPER);⁷⁶³ the MERCOSUR Fund for structural convergence, which was established in December 2004 to take account of needs in the infrastructure sector; the new human rights protocol (i.e., '*Protocolo de Asunción sobre Compromiso con la Promoción y Protección de los Derechos Humanos del Mercosur*') that was adopted at the summit meeting of December 2005 in Montevideo and is intended to strengthen the 'democracy clause';⁷⁶⁴ and the MERCOSUR Parliament,⁷⁶⁵ which was also

⁷⁶² Martins, Renata, *Das Südamerikanische Gemeinsame Markt im Überblick*, in: *Recht der Internationalen Wirtschaft* (RIW) Book 11/1999, p. 853, quoted by Basedow, Jürgen, in: Basedow, Jürgen/Samtleben, Jürgen (Eds.), 2001, p. 15.

⁷⁶³ Council Decision Nr. 11/03.

⁷⁶⁴ Preamble of the human rights protocol:

“La República Argentina, la República Federativa del Brasil, la República del Paraguay y la República Oriental del Uruguay, Estados Partes del MERCOSUR, en adelante las Partes, REAFIRMANDO los principios y objetivos del Tratado de Asunción y del Protocolo de Ouro Preto; TENIENDO PRESENTE la Decisión CMC 40/04 que crea la Reunión de Altas Autoridades sobre Derechos Humanos del MERCOSUR;

REITERANDO lo expresado en la Declaración Presidencial de las Leñas el 27 de junio de 1992, en el sentido de que la plena vigencia de las instituciones democráticas es condición indispensable para la existencia y el desarrollo del MERCOSUR;

REAFIRMANDO lo expresado en la Declaración Presidencial sobre Compromiso Democrático en el MERCOSUR;

RATIFICANDO la plena vigencia del Protocolo de Ushuaia sobre Compromiso Democrático en el MERCOSUR, la República de Bolivia y la República de Chile;

REAFIRMANDO los principios y normas contenidas en la Declaración Americana de Derechos y Deberes del Hombre, en la Convención Americana sobre Derechos Humanos y otros instrumentos regionales de derechos humanos, así como en la Carta Democrática Interamericana;

RESALTANDO lo expresado en la Declaración y el Programa de Acción de la Conferencia Mundial de Derechos Humanos de 1993, que la democracia, el desarrollo y el respeto a los derechos humanos y libertades fundamentales son conceptos interdependientes que se refuerzan mutuamente;

SUBRAYANDO lo expresado en distintas resoluciones de la Asamblea General y de la Comisión de Derechos Humanos de las Naciones Unidas, que el respeto a los derechos humanos y de las libertades fundamentales son elementos esenciales de la democracia;

RECONOCIENDO la universalidad, la indivisibilidad, la interdependencia e interrelación de todos los derechos humanos, sean derechos económicos, sociales, culturales, civiles o políticos;

adopted at the summit meeting of 2005 in Montevideo.⁷⁶⁶ The parliament had its first session in May 2007 and, given that customs unions do not need parliaments, can be seen to characterise another step towards the model of supranational organisations.⁷⁶⁷

It can be argued that the system of integration among the MERCOSUR Member States is flexible. This is because the Treaty of Asunción and the protocols do not have many articles and paragraphs. While on the one hand, since the creation of the MERCOSUR there has never been a Member State government that was against it or threatened to abandon it, on the other hand the MERCOSUR does not work well. The economic integration process has not been completed and trade disputes arise constantly and create, therefore, a certain disillusion within the bloc.⁷⁶⁸ It has been argued that the main reason for this situation was the moderate left and left-wing parties in power in three of the four MERCOSUR states.⁷⁶⁹

Today the MERCOSUR represents one of the largest economic powers in the world.⁷⁷⁰ A MERCOSUR composed of Argentina, Brazil, Paraguay and Uruguay (the ‘classic MERCOSUR’) has a GDP of US\$ 2.81 Trillion.⁷⁷¹ And, if one considers a MERCOSUR made of Argentina, Brazil, Paraguay, Uruguay and Venezuela (the ‘current MERCOSUR’), the GDP goes up to US\$ 3.18 Trillion.⁷⁷² The population of

REITERANDO la Declaración Presidencial de Puerto Iguazú del 8 de julio de 2004 en la cual los Presidentes de los Estados Partes del MERCOSUR destacaron la alta prioridad que le asignan a la protección, promoción y garantía de los derechos humanos y las libertades fundamentales de todas las personas que habitan el MERCOSUR;

REAFIRMANDO que la vigencia del orden democrático constituye una garantía indispensable para el ejercicio efectivo de los derechos humanos y libertades fundamentales, y que toda ruptura o amenaza del normal desarrollo del proceso democrático en una de las Partes pone en riesgo el goce efectivo de los derechos humanos;”

⁷⁶⁵ ‘PARLASUR’ is the abbreviation in Spanish and means “*Parlamento del Mercosur*” while ‘PARLASUL’ is the abbreviation in Portuguese and means “*Parlamento do Mercosul*”.

⁷⁶⁶ But the Mercosur Parliament was indeed constituted on 14th December 2006.

⁷⁶⁷ For more details, visit the website www.parlamentodelmercosur.org.

⁷⁶⁸ Cf. European Commission, *Mercosur Regional Strategy Paper 2007-2013*, Brussels, 2007, p. 07.

⁷⁶⁹ European Commission, 2007, p. 07. The four Mercosur countries are Argentina, Brazil, Paraguay and Uruguay, as Venezuela only became a ‘member’ in 2012. The three countries with moderate left and left-wing parties that are meant are Argentina, Brazil and Paraguay.

⁷⁷⁰ It was ranked in the Mercosur Regional Strategy Paper 2007-2013 of the European Commission as the world’s fourth largest economic power (p. 09). Even though the Brazilian economy improved very much since then and Venezuela became a Member State too, the current position of the Mercosur might have changed due to the growth of the national economies of countries like China, India and Mexico.

⁷⁷¹ This number reflects the sum of the respective nominal national GDPs in the year 2013 published in the 2013 International Monetary Fund (IMF) report.

⁷⁷² This number reflects the sum of the respective nominal national GDPs in the year 2013 published in the 2013 IMF report. The GDP of every country is as follows:

the ‘current MERCOSUR’ numbers 284,586,480 people⁷⁷³ and the total area of the bloc is 12.7 million square Km,⁷⁷⁴ linking Ushuaia, which is known as the southernmost city in the world, to the Caribbean.

According to the MERCOSUR Regional Strategy Paper 2007-2013, which was published by the European Commission in 2007 and refers to the ‘classic MERCOSUR’, Argentina and Brazil, the two largest economies, represented almost 97.7% (2005) of it,⁷⁷⁵ but Brazil was by far the largest economy with 79% of the MERCOSUR’s GDP. Argentina followed with 18%, Uruguay 2%, and Paraguay 1%.⁷⁷⁶ The population in the bloc numbered 235 million people⁷⁷⁷ and the GDP per capita in the region in the year 2005 reached US\$ 4,269. There were, however, significant national differences: US\$ 4,736 in Argentina, US\$ 4,260 in Brazil, US\$ 1,323 in Paraguay and US\$ 4,800 in Uruguay.⁷⁷⁸ While the intra-regional trade of the European Union represented 65.9% of total trade and that of NAFTA was 45.3%, the MERCOSUR intra-regional trade over the period from 2002 to 2005 averaged only 15%.⁷⁷⁹ In that same period, Paraguay’s intra-MERCOSUR trade amounted to 55.7% of total trade, Uruguay’s 37%, Argentina’s 25.8% and Brazil’s merely 9.4%.⁷⁸⁰ Also in the same time frame, the European Union was the largest trading partner of the MERCOSUR with a share of 24.6%. The U.S. was the second largest trading partner

Argentina: US\$ 488,213 Million;
 Brazil: US\$ 2,242,854 Million;
 Paraguay: US\$ 28,333 Million;
 Uruguay: US\$ 56,345 Million;
 Venezuela: US\$ 373,978 Million.

⁷⁷³ Argentina with 43,024,374 inhabitants, Brazil with 202,656,788 inhabitants, Paraguay with 6,703,860 inhabitants, Uruguay with 3,332,972 inhabitants and Venezuela with 28,868,486 inhabitants. All numbers have been collected from the United States Census Bureau and refer to each country’s estimated population in the year 2014. For more details, visit <http://www.census.gov/population/international/data/countryrank/rank.php>. Date of access: 18th April 2014.

⁷⁷⁴ Brasil, *Exposição de Motivos nº 00453 do Ministério de Relações Exteriores: projetos de lei e outras proposições – MSC – 82/2007*, Brasília, Câmara dos Deputados, 2007 quoted in Rocha, Maria E. G. T./Domingues, Leyza F./Ribeiro, Elisa de S., *A Adesão da Venezuela ao Mercosul: O Manifesto da Expansão Integracionista*, January/March 2008, p. 13, which can be found at the official website of the Brazilian Senate at http://www2.senado.leg.br/bdsf/bitstream/handle/id/160155/Ades%C3%A3o_venezuela_Mercosul_17_7.pdf. Date of access: 23rd April 2014.

⁷⁷⁵ European Commission, 2007, p. 11.

⁷⁷⁶ *Ibid.*, p. 09.

⁷⁷⁷ *Ibid.*, 2007, p. 09.

⁷⁷⁸ *Ibid.*, p. 09.

⁷⁷⁹ *Ibid.*, p. 10 f.

⁷⁸⁰ *Ibid.*, p. 11.

and its share was 20%.⁷⁸¹ It should equally be noted, however, that MERCOSUR's share in the world trade over the same period (2002-2005) represented just 1.05% of total world trade.⁷⁸² Since 2007, nonetheless, the economies of all countries of the bloc, especially the Brazilian economy, developed a great deal.

With regard to the implementation of MERCOSUR legislation in the Member States, it can be said that at this stage⁷⁸³ that only about 48% of the rules adopted by the bloc's decision-making bodies are in force. The proportion of legal acts which have been implemented in certain sectors is particularly low, such as those of justice and health with 20% and 54%, respectively, having been incorporated.⁷⁸⁴ These percentages show the seriousness of the problem. Furthermore, there are some core areas of the market – the Customs Code, public procurement opening, services liberalisation and investment protection – that are set down in protocols which simply complement the Protocol of Ouro Preto.⁷⁸⁵

The cooperation between the European Union and the MERCOSUR⁷⁸⁶ suffers from a low level of accountability and ownership as well as a lack of political involvement on the part of the MERCOSUR. It is complicated for the European Union to negotiate with the MERCOSUR because the bloc has different national agendas, which now total five – i.e., the national agendas of the governments of Argentina, Brazil, Paraguay, Uruguay and Venezuela. Furthermore, it has been argued that it is not easy for the MERCOSUR Member States to provide co-funding, for example, because of budgetary constraints.⁷⁸⁷ This financial aspect also represents a considerable challenge for the implementation of a cooperation strategy. It can be said, nevertheless, that a bilateral agreement between the European Union and the MERCOSUR will be an asymmetric agreement that is going to benefit the sales of EU products more than MERCOSUR products because of the fact that the EU trades products of all economic

⁷⁸¹ *Ibid.*, p. 11.

⁷⁸² *Ibid.*, p. 11.

⁷⁸³ The 2nd October 2007, which is the date of the *Mercosur Regional Strategy Paper 2007-2013* of the European Commission.

⁷⁸⁴ European Commission, 2007, p. 16.

⁷⁸⁵ *Ibid.*

⁷⁸⁶ The interregional skeleton agreement between the European Union and the Mercosur was signed on 15th December 1995 in Madrid.

⁷⁸⁷ European Commission, 2007, p. 20.

sectors while the MERCOSUR Member States trade products that mainly belong to the primary sector.

Despite the difficulties and challenges, a series of new institutional developments have taken place within the MERCOSUR in recent years. These developments reflect the efforts – and a willingness – to adapt to new and old problems. Nevertheless, the institutional structure of MERCOSUR has not yet been perfected. This is because of the structure's lack of democracy and transparency.

It can be concluded that the MERCOSUR has been successful in increasing the economic integration of its region to a certain extent, but its economic success is not comparable to the success of the European Union and the North American Free Trade Agreement.⁷⁸⁸ In spite of this, as mentioned earlier, the MERCOSUR has been promoting peace, democracy and stability in its region since it was established in 1991. In general, the common market has also showed progress and the bloc's political dimension has gained more importance. In order to carry out the objectives of the Treaty of Asunción and thereby consummate the MERCOSUR, however, there is, in view of the fundamental problems, still much to be done.

6. Legal Sources of the MERCOSUR

The law of integration of the MERCOSUR follows the classic constitutional model of public international law, which requires State participation for the implementation of treaties in national legal systems. According to Article 41 of the Protocol of Ouro Preto, the legal sources of the MERCOSUR are:

- I. The Treaty of Asunción, its Protocols and the additional or supplementary instruments;
- II. The Agreements concluded within the framework of the Treaty of Asunción and its Protocols;

⁷⁸⁸ *Ibid.*, p. 17.

III. The Decisions of the Common Market Council, the Resolutions of the Common Market Group and the Directives of the Trade Commission of the MERCOSUR adopted since the entry into force of the Treaty of Asunción.

The first legal source is the Treaty of Asunción,⁷⁸⁹ but only insofar it has not been superseded by subsequent rules,⁷⁹⁰ and the Protocol of Ouro Preto, the Protocol of Ushuaia on the Member States' Democratic Commitment as well as the Protocol of Brasília that was signed in 1991. This was adopted less than a year after the creation of the MERCOSUR to govern the dispute settlement system of the bloc and was replaced by the Protocol of Olivos, which was signed in 2002 and created the Permanent Court of Review.

On the other hand, there are a number of protocols for the promotion of the approximation of laws in the Contracting States that include the statement “part of the Treaty of Asunción” in their final clauses. These protocols and the Treaty of Asunción, therefore, make a “concluded agreement”. Accordingly, the accession of a country to the Treaty of Asunción also means its accession to the protocols.⁷⁹¹ These cover the areas of trade with services, handling of traffic accidents, free movement of goods, competition and investment law, intellectual property rights, recognition of school and academic diplomas, private international law, international civil procedure law and mutual assistance in criminal matters.

With regard to the legal sources under Art. 41 (II) – namely Agreements and Protocols – there are the *Acuerdos*⁷⁹², which have no clause incorporating them as part of the Treaty of Asunción and, therefore, are not automatically binding for acceding countries. These include the *Acuerdos* on Social Security (1997), on International Commercial Arbitration (1998) and Extradition (1998).

⁷⁸⁹ Badace and Fuders have another opinion. Based on Article 3 of the Treaty of Asunción, they say that this is not a foundation treaty but simply a stipulation of its making until 31st December 1994 (Badace, Héctor, *Derecho de la Integración y Relaciones Laborales*, 2nd ed., Montevideo, 2004, p. 219; Fuders, Felix, 2008, p. 28).

⁷⁹⁰ Samtleben, Jürgen, *Der Mercosur als Rechtssystem*, in: Basedow, Jürgen/Samtleben, Jürgen (Eds.), 2001, p. 52 f.

⁷⁹¹ Samtleben, Jürgen, in: Basedow, Jürgen/Samtleben, Jürgen (Eds.), 2001, p. 53.

⁷⁹² The term “Agreement” corresponds to the expression “Acuerdos” in Spanish, which has five different meanings in the legal instruments of the Mercosur, but just three of them are considered legal sources, and can be found at Article 41 (II) of the Protocol of Ouro Preto.

Also included within Art. 41 (II) of the Protocol of Ouro Preto is the kind of Agreement that is simultaneously registered as a MERCOSUR Agreement and as a limited scope ALADI framework Agreement.⁷⁹³

Furthermore, there are the sector-based Agreements between the respective national production sectors.⁷⁹⁴ These are envisaged in the Treaty of Asunción, shall be regarded as means for the further realisation of other freedoms in the common market and have, in fact, already contributed to the liberalisation of economic sectors.

Finally, also included in Art. 41 (III) are the legal instruments that are issued by the Common Market Council, Common Market Group and Trade Commission, namely Decisions, Resolutions and Directives. Unlike in the European Union, “Decisions”, “Resolutions” and “Directives” simply indicate their assignment to a specific decision-making body. So, the aforementioned terms do not describe the legal nature of such legal instruments.⁷⁹⁵ In addition, target groups, binding force extent and the necessity of implementation by the Member States are irrelevant for the differentiation of the legal instruments of the MERCOSUR.⁷⁹⁶ The subject matter of the Decisions, Resolutions and Directives depends on the respective competencies of the Common Market Council, the Common Market Group and the Trade Commission.

There is no hierarchical order under which the foundation treaties occupy a primary position.⁷⁹⁷ Among the legal sources, there are also the so-called accessory and complementary legal sources, to be precise: general principles of law, equity, justice and the awards (*‘laudos’*) of the TPR.

⁷⁹³ The recourse to these legal instruments was established at the beginning of the Mercosur.

⁷⁹⁴ Such as the Agreements of the iron, steel, paper, shoes and textile industrial sectors.

⁷⁹⁵ According to the remark in Samtleben, Jürgen, in: Basedow, Jürgen/Samtleben, Jürgen (Eds.), 2001, p. 56.

⁷⁹⁶ Wehner, Ulrich, 1999, p. 94.

⁷⁹⁷ This is the dominant opinion, but there is no consensus on the issue in the literature. For more details, see Martins, Renata Rocha de Mello, *Verfassungskonformität des MERCOSUR in Brasilien*, Baden-Baden, 2002, p. 45.

According to the Argentinean literature, which favours the “legal pyramid” model, the MERCOSUR legal sources have a strictly hierarchical relationship. The Treaty of Asunción sits at the top of the pyramid, followed by the protocols and agreements that belong to its framework followed, in an orderly sequence, by Decisions, Resolutions and Directives of the respective decision-making bodies of the MERCOSUR⁷⁹⁸. The basis for this view is both the model of the European Union and Art. 19 of the Protocol of Brasília, which names the MERCOSUR legal sources in that sequence but does not mention anything about their relationship with one another.⁷⁹⁹

Despite this view, the ‘legal pyramid’ model does not apply to the MERCOSUR. Art. 53 of the Protocol of Ouro Preto seems to be crucial for the *pari passu* theory.⁸⁰⁰ This is because, after the coming into force of the Protocol of Ouro Preto, the Treaty of Asunción remained valid only with regards to what was not replaced by the Protocol of Ouro Preto itself, or by subsequent legislation. The absence of a hierarchy among the MERCOSUR legal sources and, thus, their general Public International Law character can be confirmed both in the MERCOSUR law-making praxis, whereby CMC Decisions may complement and amend signed agreements, and in an explicit provision of Art. 53 of the Protocol of Ouro Preto.⁸⁰¹ So, the order in which the legal sources of the MERCOSUR have been written in both Art. 19 of the Protocol of Brasília⁸⁰² and Art. 41 of the Protocol of Ouro Preto does not establish any hierarchy.⁸⁰³

In addition, the MERCOSUR has no supranational law⁸⁰⁴ and all legal instruments must, in principle, be made domestically applicable through their implementation into national law,⁸⁰⁵ something that depends on the will of the Member States.

⁷⁹⁸ For example, Cassagne, Juan Carlos, *El Mercosur y las Relaciones con el Derecho Interno*, in: *La Ley 1995-C*, p. 881; Péres Otermin, Jorge, *El Mercado Común del Sur desde Asunción a Ouro Preto, Aspectos Jurídico-institucionales*, Montevideo, 1995, p. 108 ff.; both quoted by Samtleben, Jürgen, in: Basedow, Jürgen/Samtleben, Jürgen (Eds.), 2001, p. 58.

⁷⁹⁹ Samtleben, Jürgen, in: Basedow, Jürgen/Samtleben, Jürgen (Eds.), 2001, p. 58.

⁸⁰⁰ This theory means ‘with equal step’ – i.e., without preference.

⁸⁰¹ Tramón, José Miguel Olivares, 2006, p. 75.

⁸⁰² Art. 19 of the Protocol of Brasília lists the legal sources on which arbitral tribunals should base their decisions.

⁸⁰³ Cf. Samtleben, Jürgen, in: Basedow, Jürgen/Samtleben, Jürgen (Eds.), 2001, p. 58.

⁸⁰⁴ The term formally appeared in 1951 in the Treaty of Paris establishing the European Coal and Steel Community (ECSC). It has remained since then an integral part of the political and scientific terminology. Cf. for example Zuleeg, M., Art. 1 EC, in: *Groeben/Schwarze*, side notes 6 f., BVerfG 89, 155 (175).

According to Art. 38 of the Protocol of Ouro Preto, Member States shall adopt all “necessary measures” in order to domestically implement legal instruments of the MERCOSUR decision-making bodies. These measures should be planned to such an extent that it may be concluded that both the Member States’ obligation of permanent compliance with the MERCOSUR legal instruments and the obligation to construe national measures in accordance with the MERCOSUR law are being followed.⁸⁰⁶ These instruments of the decision-making bodies are not “self-executing” international norms, i.e. they have to be implemented into national law in order to become nationally applicable. Additionally, the national texts have to correspond to the original texts and, consequently, to the bloc’s interests.⁸⁰⁷

Following the implementation, the entry into force at national level takes place. This differs according to the country. The position in the national hierarchy of norms may also vary⁸⁰⁸. According to Art. 40 of the Protocol of Ouro Preto, Member States must inform the Administrative Secretariat of the MERCOSUR about the status of the implementation of norms. The Secretariat in turn informs the Member States on the date upon which all countries have implemented a certain MERCOSUR norm into national law. The new norm then comes into force in all Member States 30 days after the Secretariat’s report.

Furthermore, there was until recently no deadline for the implementation of the bloc’s legal instruments into national law. The result was that some Decisions were not implemented at all, although they were, according to the Protocol of Ouro Preto, binding upon all Member States⁸⁰⁹. In 2002, the procedure was modified in order to improve the national implementation of the MERCOSUR legal instruments and the compliance with Article 40 of the Protocol of Ouro Preto. According to the new

⁸⁰⁵ Although there is a lack of transfer of sovereignty to the institutional structure of the Mercosur, meanwhile the issue became controversial both in legal doctrine and case law.

⁸⁰⁶ Samtleben, Jürgen, in: Basedow, Jürgen/Samtleben, Jürgen (Eds.), 2001, p. 52 f.

⁸⁰⁷ Seidl-Hohenveldern, Ignaz/Loibl, Gerhard, *Das Recht der Internationalen Organisationen einschließlich der Supranationalen Gemeinschaften*, 7th ed., Köln/Berlin/Bonn/München, 2000, p. 258 f. (side note 1707).

⁸⁰⁸ Samtleben, Jürgen, in: Basedow, Jürgen/Samtleben, Jürgen (Eds.), 2001, p. 64 f.

⁸⁰⁹ Geneyro, R. A./Muños, M. O., *Mercosur: un marco jurídico adecuado como resguardo de los avances comerciales*, in: *Revista de direito do Mercosul* 1, 1998, p. 187; quoted by Martins, Renata Rocha de Mello, 2002, p. 47.

procedure, the representatives of the Member States have to agree on every draft of the bloc's legal instruments. Member States become committed to submit their respective written confirmations on the draft to the appropriate decision-making body within 60 days. So, Member States have to confirm that they are capable of implementing the forthcoming legal instrument into national Law by means of an administrative act or a bill. Consequently, a draft becomes a legal source after all Member States have specified their respective forms of implementation and the time limits thereof.

In 2004, a 90-day maximum time limit was established for the implementation of legal instruments of the MERCOSUR decision-making bodies through national administrative acts.⁸¹⁰ In addition, these instruments of the bloc must include a clear deadline for their entry into force, and be published in the law gazettes of the Member States 40 days prior to that time limit.⁸¹¹

By contrast, there is no implementation obligation with regard to the remaining legal sources of the MERCOSUR. Nevertheless, implementation compliance may be required by means of the MERCOSUR's dispute settlement mechanism.⁸¹²

The treaties, agreements and protocols of the MERCOSUR require parliamentary approval and subsequent ratification in order to come into force domestically. In the Brazilian legal system, for example, the aforementioned documents have the same hierarchy as general Public International Law treaties, i.e. they require the approval of the National Congress in order to be legally effective.⁸¹³ Brazil and Uruguay determine, in addition, that subsequent local law, namely at the national level, implies the abolition of a previous international instrument. So, both follow the principle of *lex posterior derogat priori*,⁸¹⁴ which unquestionably affects the Law of Integration.⁸¹⁵ Bastos summarises the position by stressing that Brazil and Uruguay

⁸¹⁰ Cf. Council Decision Nr. 22/04.

⁸¹¹ Tramón, José Miguel Olivares, p. 81.

⁸¹² Samtleben, Jürgen, in: Basedow, Jürgen/Samtleben, Jürgen (Eds.), 2001, p. 75.

⁸¹³ Di Nizo, Rosana Tarla, *O Mercosul e a Supranacionalidade frente ao Direito Comunitário*, in: Mialhe, Jorge Luís (Ed.), *Direito das Relações Internacionais: Ensaio Histórico e Jurídico*, Campinas, 2006, p. 314.

⁸¹⁴ Di Nizo, Rosana Tarla, in: Mialhe, Jorge Luís (Ed.), 2006, p. 328.

⁸¹⁵ Concerning Brazil, given that international treaties have the status of federal legislation, they are subject to principles of conflicts of laws in time, e.g. *lex posterior derogat priori* and *lex posterior*

act in the fullness of their sovereignty and only accept international law rules according to their political convenience and in compliance with constitutional provisions.⁸¹⁶

While Brazil and Uruguay are dualist, Paraguay and Argentina are monist. Compared to the former two countries, in both Paraguay and Argentina the process of implementation of treaties is quicker and more efficient. This is because the Paraguayan and Argentinean constitutions were reformed after the Treaty of Asunción which created the MERCOSUR in 1991 – i.e., the Paraguayan constitution was reformed in 1992 and the Argentinean constitution in 1994 – in order to guarantee that treaties have the same status of constitutional norms and become valid within their legal systems without the necessity of any approval by members of the legislative power. It is also implied that Paraguay and Argentina are geared towards a supranational legal order. Brazil and Uruguay must, as a result, also introduce reforms to their national constitutions, given that both *Magna Cartas* were not developed with regard to MERCOSUR law after the creation of the bloc in 1991. Without reforms, MERCOSUR's integration goal will continue to be disadvantaged.

Venezuela has 3 main peculiar features *vis-à-vis* international law that are in stark contrast to the other MERCOSUR Member States. Firstly, Venezuela is both monist and dualist, as it follows a mixed theory in the relationship between international and national law in that in some circumstances monist⁸¹⁷ but in others it is dualist.⁸¹⁸

generalis non derogate legi priori speciali. But, there are 3 exceptions to this parity understanding: international treaties about (1) Human Rights, (2) extradition of non-nationals and (3) taxation matters. For more details, see the section 'Brazilian Constitutional Law and International Treaties' in the chapter on Brazil of this thesis.

⁸¹⁶ Bastos, Carlos Eduardo Caputo, *Tratado do Mercosul e Executoriedade*, in: Correio Braziliense, Brasília, 08.07.1998, p. 3, quoted in Di Nizo, in: Mialhe, Jorge Luís (Ed.), 2006, p. 315.

⁸¹⁷ Monist examples are Art. 23 concerning human rights and part of Art. 153 with regard to integration agreements.

“Artículo 23. Los tratados, pactos y convenciones relativos a derechos humanos, suscritos y ratificados por Venezuela, tienen jerarquía constitucional y prevalecen en el orden interno, en la medida en que contengan normas sobre su goce y ejercicio más favorables a las establecidas por esta Constitución y en las leyes de la República, y son de aplicación inmediata y directa por los tribunales y demás órganos del Poder Público.”

“Artículo 153. (...) Las normas que se adopten en el marco de los acuerdos de integración serán consideradas parte integrante del ordenamiento legal vigente y de aplicación directa y preferente a la legislación interna.”

⁸¹⁸ Dualist examples are articles 154, 217 and 236, section 4.

“Artículo 154. Los tratados celebrados por la República deben ser aprobados por la Asamblea Nacional antes de su ratificación por el Presidente o Presidenta de la República, a excepción de

Secondly, Venezuela has a Constitution that was adopted in 1999 and is the ‘youngest’ national *Magna Carta* among the MERCOSUR Member States. Thirdly, although Venezuela is monist with regard to some matters and dualist with regard to others, its Constitution explicitly favours a supranational legal order – i.e., “(...) *la República podrá atribuir a organizaciones supranacionales, mediante tratados, el ejercicio de las competencias...*” and “*(l)as normas que se adopten en el marco de los acuerdos de integración serán consideradas parte integrante del ordenamiento legal vigente y de aplicación directa y preferente a la legislación interna*”⁸¹⁹ – and clearly defines that the country may even substitute its own national currency by a currency that is common to other Latin American countries by means of an international treaty⁸²⁰ – i.e., similarly to the Euro in the countries that form the Eurozone.

As already mentioned above, the current MERCOSUR legal system is intergovernmental. This is also supported by Articles 37 and 42 of the Protocol of Ouro Preto. Furthermore, the intergovernmental model of the MERCOSUR is based on the classical perceptions of sovereignty and public international law. Intergovernmentalism can be viewed as an intermediate level between traditional

aquellos mediante los cuales se trate de ejecutar o perfeccionar obligaciones preexistentes de la República, aplicar principios expresamente reconocidos por ella, ejecutar actos ordinarios en las relaciones internacionales o ejercer facultades que la ley atribuya expresamente al Ejecutivo Nacional.”

“Artículo 217. La oportunidad en que deba ser promulgada la ley aprobatoria de un tratado, de un acuerdo o de un convenio internacional, quedará a la discreción del Ejecutivo Nacional, de acuerdo con los usos internacionales y la conveniencia de la República.”

“Artículo 236. Son atribuciones y obligaciones del Presidente o Presidenta de la República:

(...)

4. Dirigir las relaciones exteriores de la República y celebrar y ratificar los tratados, convenios o acuerdos internacionales.”

⁸¹⁹ *“Artículo 153. La República promoverá y favorecerá la integración latinoamericana y caribeña, en aras de avanzar hacia la creación de una comunidad de naciones, defendiendo los intereses económicos, sociales, culturales, políticos y ambientales de la región. La República podrá suscribir tratados internacionales que conjuguen y coordinen esfuerzos para promover el desarrollo común de nuestras naciones, y que garanticen el bienestar de los pueblos y la seguridad colectiva de sus habitantes. Para estos fines, la República podrá atribuir a organizaciones supranacionales, mediante tratados, el ejercicio de las competencias necesarias para llevar a cabo estos procesos de integración. Dentro de las políticas de integración y unión con Latinoamérica y el Caribe, la República privilegiará relaciones con Iberoamérica, procurando sea una política común de toda nuestra América Latina. Las normas que se adopten en el marco de los acuerdos de integración serán consideradas parte integrante del ordenamiento legal vigente y de aplicación directa y preferente a la legislación interna.”*

⁸²⁰ *“Artículo 318. Las competencias monetarias del Poder Nacional serán ejercidas de manera exclusiva y obligatoria por el Banco Central de Venezuela. El objetivo fundamental del Banco Central de Venezuela es lograr la estabilidad de precios y preservar el valor interno y externo de la unidad monetaria. La unidad monetaria de la República Bolivariana de Venezuela es el Bolívar. En caso de que se instituya una moneda común en el marco de la integración latinoamericana y caribeña, podrá adoptarse la moneda que sea objeto de un tratado que suscriba la República.”*

sovereignty and supranationalism in which Member States retain their sovereignty in terms of their legal systems but may participate in processes of integration.⁸²¹

Community law emerged with the end of World War II as a development of general public international law, however the concept of sovereignty in a system governed by community rules is different. Already at that time, the European Community Member States relinquished parts of their sovereignty to supranational institutions with decision-making power and whose decisions are directly applicable and generate immediate legal consequences, which also include penalties for cases of non-compliance. The scope of a precise legal system has been developed on a step-by-step basis in Europe. With its own sphere of application established, community law was then born. It is neither international law nor national law, but a closed circuit of directly applicable law. The CJEU is a natural product of this impressive legal evolution.

MERCOSUR law is sub-divided into primary and secondary law, whereby the latter is regarded as comprising instruments of the MERCOSUR decision-making bodies.⁸²² There is a consensus on this in the literature.⁸²³ So, as in the European Union, there is a primary and a secondary law in the MERCOSUR.

6.1. MERCOSUR Primary Law

The term ‘MERCOSUR primary law’ means the legal acts that have been introduced as international treaties, protocols and agreements, namely the Treaty of Asunción and its institutional protocols plus all the legislative process protocols that complement the Treaty of Asunción. The institutional protocols are the Protocol of Brasília, Protocol of Olivos⁸²⁴ and the Protocol of Ouro Preto. By contrast, legislative

⁸²¹ For more details, see Di Nizo, Rosana Tarla, in: Mialhe, Jorge Luís (Ed.), 2006, p. 314.

⁸²² For details, see Dromi San Martino, Laura, *El Mercosur y el derecho internacional del comercio* in: Lattuca, Ada/Ciuro Caldani, Miguel Angel (Eds.), *Economía globalizada y Mercosur*, Buenos Aires, 1998, p. 161.

⁸²³ E.g., Bogdandy, Armin von/Nettesheim, Martin, in: Grabitz, Eberhard/Hilf, Meinhard (Eds.), *Kommentar zur Europäischen Union*, Loseblattsammlung (looseleaf service), München, 1994, Art. 1, side notes 12 ff; Streinz, Rudolf, *Europarecht*, 3rd ed., Müller, Heidelberg, 1996, side notes 3 f.

⁸²⁴ As already explained, the Protocol of Olivos substituted the Protocol of Brasília.

process protocols are for legal harmonisation and are provided for in various legal areas. Some of these protocols are to be regarded as integral parts of the Treaty of Asunción. As a result, the accession of a country to the Treaty of Asunción also means an accession to these protocols.

Ratification makes the two aforementioned categories of protocols come into effect under both international law and domestic law. Primary MERCOSUR law is, as a consequence, directly applicable, i.e. it must not be converted into national law. The domestic validity and application of primary MERCOSUR law, nonetheless, are governed by the respective national provisions adopted thereunder.⁸²⁵

Norms of primary law can also either have a direct effect/applicability⁸²⁶ or simply be programmatic norms. For the structure of organs itself, primary law alone is decisive, and institutional legal questions also draw on the sources of primary law.

6.2. MERCOSUR Secondary Law

The term ‘MERCOSUR secondary law’ refers to legal acts that are produced by its bodies. These legal acts have been considerably developed since the Treaty of Asunción, not only because new bodies have been created and have also started producing legal acts but also because, at the same time, there has been an increasing differentiation among the legal acts of the earlier existing bodies.

These bodies do not have the capacity to issue rules of law that are directly applicable in the national legal systems of the Member States. Accordingly, legal acts must first be implemented into national Law. As *Martins* summarises, legal acts of

⁸²⁵ To this, see Salomão Filho, Calixto/Samtleben, Jürgen, in: *Wertpapier-Mitteilungen (WM)*, Zeitschrift für Wirtschafts- und Bankrecht, Frankfurt am Main, 1992, p. 1388; Dromi San Martino, Laura, *El Mercosur y el derecho internacional del comercio* in: Lattuca, Ada/Ciuro Caldani, Miguel A. (Eds.), *Economía globalizada y Mercosur*, Buenos Aires, 1998, p. 144; Greiner, Walter, *Die Interregionale Assoziierung zwischen der Europäischen Union und dem Mercosur: Ein Modell für die Kooperation zwischen mehreren Freihandelszonen im Rahmen der Welthandelsordnung*, Frankfurt am Main, 2004, p. 47; Costa de Lara, Antonio R., *Justiça supranacional no Mercosul*, in: Lattuca, Ada/Ciuro Caldani, Miguel A. (Eds.), 1998, p. 203.

⁸²⁶ Direct effect in monist countries (e.g., Argentina) and direct applicability in dualist countries. For details on Brazil, see the section ‘Brazilian Constitutional Law and International Treaties’ in chapter III.

MERCOSUR bodies often concern only the Member States themselves, are limited to State level and binding among the governments.⁸²⁷

It is established, following the Protocol of Ouro Preto, that the CMC issues decisions, the GMC issues resolutions and the CCM issues directives which are binding on the MERCOSUR Member States.⁸²⁸ So, the nature of MERCOSUR legal acts is not determined with regard to contents, but according to the body that issues them.⁸²⁹ A distinction according to target group, the extent of the binding force and the corresponding different domestic validity, as is known in EC/EU law,⁸³⁰ does not exist in secondary MERCOSUR law.

Legal norms created by MERCOSUR bodies shall enter into force according to the principle of '*vigencia simultánea*' – i.e., shall enter into force simultaneously in the Member States.⁸³¹ This system means that the validity of secondary MERCOSUR law significantly depends on the implementation into national law within the Member States. It is, therefore, a regular public international law procedure.

The Protocol of Olivos,⁸³² the GMC resolution Nr. 23/98 and the CMC decision Nr. 3/99 established a precise arrangement for the incorporation of secondary law into the national legal systems. The resolution states that 'the decision making bodies (CMC, GMC and CCM), when passing legal norms, shall also at the same time determine the time limit within which the implementation into the national legal systems must take place.'⁸³³ According to Art. 5 section (i), GMC resolution Nr. 23/98 in conjunction with Art. 40 paragraph 1 of the Protocol of Ouro Preto, Member States must respect

⁸²⁷ "Oft betreffen die Akte der Organe nur die Mitgliedstaaten selbst und ihre Wirkung beschränkt sich darauf, für diese überstaatlich verbindlich zu sein" (Martins, Renata Rocha de Mello, 2002, p. 180).

⁸²⁸ According to Articles 9, 15, 20 and 42 of the Protocol of Ouro Preto.

⁸²⁹ Samtleben, Jürgen, *Der südamerikanische gemeinsame Markt (MERCOSUR) und seine neue Verfassung*, in: *Wertpapier-Mitteilungen*, 1996, Nr. 44, p. 2004.

⁸³⁰ Cf. Art. 4 and 249 of the EC Treaty. In addition, Schmidt, Gudrun, *Art. 249*, in: von der Groeben, Hans/Schwarze, Jürgen (Eds.), *EU-/EG-Vertrag, Kommentar*, 6th ed., Baden-Baden, Nomos, 2003, marginal numbers 25 ff.

⁸³¹ Art. 40 paragraph 3 of the Protocol of Ouro Preto: "*Las normas entrarán en vigor simultáneamente en los Estados Partes 30 días después de la fecha de comunicación efectuada por la Secretaría Administrativa del Mercosur, en los términos del literal anterior. Con ese objetivo, los Estados Partes, dentro del plazo mencionado, darán publicidad del inicio de la vigencia de las referidas normas, por intermedio de sus respectivos diarios oficiales.*"

⁸³² Art. 40.

⁸³³ Art. 4 of CMG resolution Nr. 23/98. The original text in Spanish can be found at www.mercosur.org.uy/espanol/snor/normativa/resoluciones/1998/res2398.htm, BOM, Nr. 7, 1998.

the time limit (i.e. deadline) that has been established for implementation. In addition, when all the Member States have reported implementation into their respective domestic legal systems, the MERCOSUR Administrative Secretariat shall inform each member State accordingly.⁸³⁴

In order to comply with the aforementioned obligation and to ensure the principle of ‘*vigencia simultánea*’, Art. 40 of the Protocol of Ouro Preto provides for the following proceeding:

“In order to ensure the simultaneous entry into force in the Member States of the decisions adopted by the MERCOSUR bodies listed in Article 2 of this Protocol, the following procedure must be followed:

- i) Once the decision has been adopted, the Member States shall take the necessary measures to incorporate it in their domestic legal system and inform the MERCOSUR Administrative Secretariat;
- ii) When all the Member States have reported adopting the decision into their respective domestic legal systems, the MERCOSUR Administrative Secretariat shall inform each Member State accordingly;
- iii) The decisions shall enter into force simultaneously in the Member States 30 days after the date of the notice given by the MERCOSUR Administrative Secretariat, under the terms of the preceding paragraph. To this end, within the time-limit mentioned above, the Member States shall give notice of the entry into force of the decision in question in their respective official bulletins.”⁸³⁵

⁸³⁴ For details, see Art. 5 section (ii) of the GMC resolution Nr. 23/98 in conjunction with Art. 40 paragraph 2 of the Protocol of Ouro Preto

⁸³⁵ Art. 40: *Con la finalidad de garantizar la vigencia simultánea en los Estados Partes de las normas emanadas de los órganos del MERCOSUR previstos en el Artículo 2 de este Protocolo, deberá seguirse el siguiente procedimiento:*

- i) Una vez aprobada la norma, los Estados Partes adoptarán las medidas necesarias para su incorporación al ordenamiento jurídico nacional y comunicarán las mismas a la Secretaría Administrativa del MERCOSUR;*
- ii) Cuando todos los Estados Partes hubieren informado la incorporación a sus respectivos ordenamientos jurídicos internos, la Secretaría Administrativa del MERCOSUR comunicará el hecho a cada Estado Parte;*
- iii) Las normas entrarán en vigor simultáneamente en los Estados Partes 30 días después de la fecha de comunicación efectuada por la Secretaría Administrativa del MERCOSUR, en los términos del*

As a result, this system makes the creation of a community law in the sense of an “own legal system”⁸³⁶ even more difficult.

6.3. Addressees of MERCOSUR Law

The Member States and their private persons are the intended addressees of MERCOSUR law. As already pointed out in section 2 of this chapter, Member States expect to increase the competitiveness of their economies in the world market and attract more foreign investments. Private persons, therefore, play a very important role for the success of the MERCOSUR.

All Member States are bound to adhere to the norms of primary law – namely the Treaty of Asunción and its institutional protocols plus all the legislative process protocols that complement the Treaty of Asunción⁸³⁷ – as well as secondary law – i.e. legal acts that are produced by its bodies⁸³⁸ – in their respective national territories and reciprocal relationships.

After the coming into force of the Protocol of Olivos,⁸³⁹ private persons – i.e. individuals and legal entities – may file complaints⁸⁴⁰ in connection with the adoption or application, by any of the Member States, of legal or administrative measures

literal anterior. Con ese objetivo, los Estados Partes, dentro del plazo mencionado, darán publicidad del inicio de la vigencia de las referidas normas por intermedio de sus respectivos diarios oficiales.

⁸³⁶ Cf. ECJ, Case 6/64, *Costa v ENEL*, collection of 1964, p. 1269.

⁸³⁷ Art. 41 of the Protocol of Ouro Preto: *Las fuentes jurídicas del MERCOSUR son:*

I - El Tratado de Asunción, sus protocolos y los instrumentos adicionales o complementarios;

II - Los acuerdos celebrados en el marco del Tratado de Asunción y sus protocolos;

⁸³⁸ Art. 41 (III) of the Protocol of Ouro Preto: Las Decisiones del Consejo del Mercado Común, las Resoluciones del Grupo Mercado Común y las Directivas de la Comisión de Comercio del MERCOSUR, adoptadas desde la entrada en vigor del Tratado de Asunción.

⁸³⁹ The Protocol of Olivos was signed in 2002, but entered into force in 2004.

Art. 55 (1): As of its entry into force, this protocol shall substitute the Protocol of Brasília on Dispute Settlement, which was signed on 17th December 1991, and shall substitute the Regulation of the Protocol of Brasília, CMC Decision 17/98.

Art. 55 (2): However, the respective provisions of the Protocol of Brasília and of its Regulation shall continue to apply until the disputes initiated under the Protocol of Brasília have been terminated and until the proceedings provided for in Article 49 have been concluded.

Art. 55 (3): Any references to the Protocol of Brasília in the Protocol of Ouro Preto and its annex shall be deemed to be references to this Protocol where applicable.

⁸⁴⁰ Details can be found in Art. 39 to Art. 44 of the Protocol of Olivos.

having a limiting, discriminatory or unfair competition effect in violation of the Treaty of Asunción, the decisions of the Common Market Council, the resolutions of the Common Market Group, and the directives of the MERCOSUR Trade Commission.⁸⁴¹ The private persons concerned are required to file their claims with the '*sección nacional*' – which can be translated as 'national section' or 'national chapter', and the former expression will be used from now on – of the Common Market Group of the Member State they reside in or have their place of business.⁸⁴² Such persons must provide evidence of a violation and current or imminent damage, in order for the claim to be admitted by the national section and by the group of experts, if called upon.⁸⁴³ A concrete damage or detriment is not necessary, but simply proof of a subjective interest in the claim, as in EU law. Unless the claim refers to a matter covered by a dispute settlement procedure in accordance with chapters IV to VII of the Protocol of Olivos, the national section of the Common Market Group that received the complaint pursuant to Art. 40 of the Protocol of Olivos requires to engage in consultations with the national section of the Common Market Group of the Member State charged with the violation, with the aim of finding an immediate solution for the matter raised. Such violations will automatically be deemed to be concluded with no further formal steps if the matter is not settled within 15 days of the notice of the complaint to the Member State charged with the violation, unless the parties agree on a different period of time.⁸⁴⁴ If consultations end without a solution having been reached, the national section of the Common Market Group will automatically forward the complaint to the Common Market Group.⁸⁴⁵ Upon receiving the complaint, the Common Market Group, in the meeting immediately following the receipt of complaint, assesses the requirements set forth in Art. 40 (2), which provide the basis for the complaint being admitted by the national section. In the event that the Common Market Group does not find that the requirements for accepting the complaint have been met, the complaint will be rejected through a decision taken by consensus.⁸⁴⁶ In the event that the Common Market Group does not reject the complaint, the complaint will be deemed to be accepted. In this case, the Common Market Group will immediately call upon a group of experts to provide an

⁸⁴¹ For more details, see Art. 39 of the Protocolo of Olivos.

⁸⁴² For more details, see Art. 40 (1) of the Protocol of Olivos.

⁸⁴³ For more details, see Art. 40 (2) of the Protocol of Olivos.

⁸⁴⁴ For more details, see Art. 41 (1) of the Protocol of Olivos.

⁸⁴⁵ For more details, see Art. 41 (2) of the Protocol of Olivos.

⁸⁴⁶ For more details, see Art. 42 (1) of the Protocol of Olivos.

opinion on the issue within a period of 30 days (non-extendable) of their appointment.⁸⁴⁷ Within this period, the group of experts will give the claimant and the States involved in the claim the opportunity to be heard and to submit their arguments at a joint hearing.⁸⁴⁸⁻⁸⁴⁹

On the other hand, the Protocol of Olivos does not provide in any way for the possibility for private persons to override the position of MERCOSUR bodies. As a result, by contrast to EU Law, in MERCOSUR law private parties have no right of action. This conclusion is also shared by several authors.⁸⁵⁰

If the action is to be brought against another private party and its cause relates to MERCOSUR law, direct effect of MERCOSUR norms exists, in principle, only after

⁸⁴⁷ For more details, see Art. 42 (2) of the Protocol of Olivos.

⁸⁴⁸ For more details, see Art. 42 (3) of the Protocol of Olivos.

⁸⁴⁹ Art. 43 about the group of experts:

(1) El grupo de expertos a que se hace referencia en el artículo 42.2 estará compuesto por tres (3) miembros designados por el Grupo Mercado Común o, a falta de acuerdo sobre uno o más expertos, éstos serán elegidos por votación que realizarán los Estados Partes entre los integrantes de una lista de veinticuatro (24) expertos. La Secretaría Administrativa del MERCOSUR comunicará al Grupo Mercado Común el nombre del experto o de los expertos que hubieren recibido la mayor cantidad de votos. En este último caso, y salvo que el Grupo Mercado Común lo decida de otra manera, uno (1) de los expertos designados no podrá ser nacional del Estado contra el cual se formuló el reclamo, ni del Estado en el cual el particular formalizó su reclamo, en los términos del artículo 40.

(2) Con el fin de constituir la lista de expertos, cada uno de los Estados Partes designará seis (6) personas de reconocida competencia en las cuestiones que puedan ser objeto del reclamo. Dicha lista quedará registrada en la Secretaría Administrativa del MERCOSUR.

(3) Los gastos derivados de la actuación del grupo de expertos serán sufragados en la proporción que determine el Grupo Mercado Común o, a falta de acuerdo, en montos iguales por las partes directamente involucradas en el reclamo.

Art. 44 about the opinion of the group of experts:

(1) El grupo de expertos elevará su dictamen al Grupo Mercado Común.

i) Si en dictamen unánime se verificare la procedencia del reclamo formulado en contra de un Estado Parte, cualquier otro Estado Parte podrá requerirle la adopción de medidas correctivas o la anulación de las medidas cuestionadas. Si su requerimiento no prosperare dentro de un plazo de quince (15) días, el Estado Parte que lo efectuó podrá recurrir directamente al procedimiento arbitral, en las condiciones establecidas en el Capítulo VI del presente Protocolo.

ii) Recibido el dictamen que considere improcedente el reclamo por unanimidad, el Grupo Mercado Común dará de inmediato por concluido el mismo en el ámbito del presente Capítulo.

iii) En caso que el grupo de expertos no alcance la unanimidad para emitir el dictamen, elevará sus distintas conclusiones al Grupo Mercado Común, que dará de inmediato por concluido el reclamo en el ámbito del presente Capítulo.

(2) La finalización del reclamo por parte del Grupo Mercado Común, en los términos de los apartados ii) y iii) del numeral anterior, no impedirá que el Estado Parte reclamante dé inicio a los procedimientos previstos en los Capítulos IV a VI del presente Protocolo.

⁸⁵⁰ Cárdenas, Sara L. Feldstein de et al., *Del Protocolo de Brasilia al Protocolo de Olivos*, in: CAEI, *Ponencia presentada y aprobada ante el II Congreso Bonaerense de Derecho Comercial*. Comisión 6: Arbitraje Comercial, Colegio de Abogados del Departamento Judicial de San Isidro, Instituto de Derecho Internacional Privado, 11, 12 and 13 May, Buenos Aires, 2006, p. 3; Garabelli, Carlos A. G., *Procesos de Integración: Mercosur – Solución de Controversias*, 2004, p. 212.

their implementation in the domestic legal system, when national courts may apply those norms. For the time being, this ‘implementation requirement’ is disputed in both the literature and case law. In case of doubt, any national court always has the alternative option of requesting that the highest national court demands an *Opinión Consultiva* from the *Tribunal Permanente de Revisión*.

Private parties can also litigate within the scope of the agreement on international trade arbitral jurisdiction of the MERCOSUR.⁸⁵¹

7. The MERCOSUR and the WTO

The MERCOSUR has the characteristics of a regional trade agreement. This means that it was created as an exception to the principle of the most favoured nation (MFN).⁸⁵² So, it is appropriate to examine MERCOSUR’s status in terms of Art. XXIV GATT/WTO.⁸⁵³ The MERCOSUR was presented to the GATT on the basis of its Enabling Clause in 1992 – i.e., one year after its establishment under the Treaty of Asunción of 1991 and 3 years before the establishment of the WTO in 1995. The clause⁸⁵⁴ allows a special procedure and a less rigid examination by the Committee on Trade and Development, the organ of the WTO that deals with developing countries and trade agreements among developing countries. There is, however, still no definitive decision on the compatibility of the MERCOSUR with the GATT/WTO rules. It may take a long time for a conclusion to be reached in view of the conduct adopted by the WTO with respect to other notified trade agreements.

According to Art. XXIV of the GATT 1994, the MERCOSUR would have a period of 10 years, which is subject to extension in exceptional cases, to meet the requirements

⁸⁵¹ Council Decision Nr. 4/98 of 23rd July 1998.

⁸⁵² This principle is embodied in Art. I GATT and means that every Member of the GATT is obliged to extend any concession granted to another Member to all Members.

⁸⁵³ The main requirements that a Regional Trade Agreement or a Customs Union has to meet in order to be approved by GATT/WTO are (a) to cover substantially all the trade, (b) to remove all tariffs and quantitative restrictions in a reasonable length of time, and (c) to not generate more barriers to third countries that are also members of the WTO.

⁸⁵⁴ Adopted during the Tokyo Round negotiations in 1979, the Enabling Clause introduces the notions of non-reciprocity and positive discrimination for development purposes.

to become compatible with WTO rules.⁸⁵⁵ These conditions relate both to the functioning of a free trade area among the Member States and the functioning of a customs union.

One could say that Art. XXIV imposes a more formal than effective control on all trade agreements so as to prevent their proliferation from endangering the entire multilateral trading system. Furthermore, the vagueness of its terms and the gaps found are the main reasons for its limited performance. To date, no notification to the WTO has been denied. This makes me assume that there is a political formality.

The MERCOSUR has an indivisible link with the WTO because its legitimacy before the WTO and within the WTO legal system is tied to the fulfilment of obligations. Furthermore, one may consider that the requirements set by WTO law in order for regional trade agreements to be accepted by its WTO multilateral regime imply the supremacy of the multilateral system over regional systems.⁸⁵⁶ Nevertheless, there are two approaches to this issue.⁸⁵⁷ The first says that all international agreements have the same weight – i.e., once a regional agreement, free trade agreement or customs union is established with its independent legal framework and dispute settlement mechanism, it is independent.⁸⁵⁸ The second approach considers regional agreements as WTO subsystems, i.e. completely subordinated to the WTO.⁸⁵⁹ According to *Petersmann*, however, there is no supremacy of the WTO and its dispute settlement bodies *vis-à-vis* regional trade agreements like the MERCOSUR and their dispute

⁸⁵⁵ Understanding on the Interpretation of Article XXIV of the General Agreement on Tariffs and Trade 1994: Article XXIV:5, paragraph 3. “The “reasonable length of time referred to in paragraph 5(c) of Article XXIV should exceed 10 years only in exceptional cases. In cases where Members parties to an interim agreement believe that 10 years would be insufficient they shall provide a full explanation to the Council for Trade in Goods of the need for a longer period.” For more details, see http://www.wto.org/english/res_e/booksp_e/analytic_index_e/gatt1994_09_e.htm . Date of access: 11th October 2012.

⁸⁵⁶ For details, see Van Damme, Isabelle, *Role of Regional International Law in WTO Agreements*, in: Bartels, Lorand/Ortino, Federico (Eds.), *Regional Trade Agreements and the WTO Legal System*, Oxford, 2006, quoted in Ribeiro, Samantha S. M., *Mercosur and the WTO: A Review of the Relations in the International Trading System*, in: Franca Filho, Marcílio T. et al. (Eds.), *The Law of Mercosur*, Oxford, 2010, p. 134.

⁸⁵⁷ For details, see Lavranos, Nikolaos/Viellard, Nicolas, *Competing Jurisdictions Between Mercosur and WTO*, in: *The Law and Practice of International Courts and Tribunals* 7 (2008), Leiden, 2008, p. 226 f.

⁸⁵⁸ Ribeiro, Samantha S. M., p. 134.

⁸⁵⁹ *Ibid.*, p. 134 f.

settlement bodies.⁸⁶⁰ By following *Petersmann's* standpoint, one can say that the MERCOSUR is independent of the WTO and agree with the approach that considers the relationship between the WTO and regional agreements as one of dialogue and coordination on one side (“WTO dualism”) and of competition and conflict on the other (“WTO monism”).⁸⁶¹ Moreover, *Perotti* notes that a legal order of regional integration like that of the MERCOSUR exists not only to facilitate international trade, but also to establish a common market with the legal consequences that this generates.⁸⁶² In fact, the MERCOSUR aims at more than just the creation of a common market, namely what is provided for in the Treaty of Asunción, which includes, amongst others, the coordination of macroeconomic policies and the harmonisation of national laws. On the other hand, the fact that the MERCOSUR Member States are also Members of the WTO,⁸⁶³ which incorporated the General Agreement on Tariffs and Trade (GATT), may lead to conflicting sources, as there is a succession of treaties that deal with common problems.

Even so, it can be concluded that, although the MERCOSUR and the WTO legal orders deal with similar matters in terms of international trade, the objectives outlined are not the same. That being the case, one cannot apply Art. 30, § 3 of the VCLT. Besides, the MERCOSUR law of integration imposes stricter norms within a more complete legal framework than those established by the WTO. What may be regarded as surprising, however, is the fact that the dispute settlement system of the MERCOSUR admits the application of the ‘*principio de la prevención de la competencia*’ (known as ‘prevention principle of competition’ and also ‘principle of lack of jurisdiction’, in English) and that a specific jurisdiction might be mutually agreed by the parties too. This is foreseen in Art. 1 (2) of the Protocol of Olivos, which specifies that:

⁸⁶⁰ Petersmann, Ernst-Ulrich, *Administration of Justice in the World Trade Organization: Did the WTO Appellate Body Commit ‘Grave Injustice’?*, in: EUI Working Papers, *Multilevel Judicial Governance Between Global and Regional Economic Integration Systems: Institutional and Substantive Aspects*, Florence, European University Institute, 2009, p. 58.

⁸⁶¹ For details, see Lavranos, Nikolaos/Villiard, Nicolas, p. 226 f.

⁸⁶² Perotti, Alejandro Daniel, *El Segundo Fallo Arbitral del Mercosur o el Amargo Despertar de Nuestro Sistema de Solución de Controversias*, in: *Revista de Derecho del Mercosur*, April 2000, Buenos Aires, p. 131 f. quoted in Pereira, Ana Cristina Paulo, *Direito Institucional e Material do Mercosul*, 2nd ed., Rio de Janeiro, 2005, p. 15.

⁸⁶³ Established on 15th December 1994, the WTO has 155 members (pending the accession of Russia), according to its official website. For up-to-date information, please see http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm. Date of access: 22nd May 2012.

“disputes falling within the scope of application of this protocol that may also be referred to the dispute settlement system of the World Trade Organization or of other preferred trade systems that the MERCOSUR Member States may have entered into, may be submitted to one forum or the other, as decided by the requesting party. Notwithstanding this, the parties to a dispute may jointly agree on the forum.”⁸⁶⁴

Yet, the same article also declares that, once a dispute settlement procedure has begun, parties shall not have the right to resort to other dispute settlement mechanisms adopted by any other forum.⁸⁶⁵

Consequently, in view of the fact that some of the purposes of the integration of the MERCOSUR countries are the free movement of goods, services and factors of production⁸⁶⁶ as well as a harmonisation of interpretation of MERCOSUR law, it can be argued that a permitted exclusion of the bloc’s dispute settlement system does not contribute to the integration process.

The next section focuses on the relation between the MERCOSUR Member States and the remaining WTO Member States.

⁸⁶⁴ Art. 1 (2) of the Protocol of Olivos:

Las controversias comprendidas en el ámbito de aplicación del presente Protocolo que puedan también ser sometidas al sistema de solución de controversias de la Organización Mundial del Comercio o de otros esquemas preferenciales de comercio de que sean parte individualmente los Estados Partes del Mercosur, podrán someterse a uno u otro foro a elección de la parte demandante. Sin perjuicio de ello, las partes en la controversia podrán, de común acuerdo, convenir el foro.

⁸⁶⁵ Two last paragraphs of Art. 1 (they do not have paragraph numbers in the text of the protocol):

Una vez iniciado un procedimiento de solución de controversias de acuerdo al párrafo anterior, ninguna de las partes podrá recurrir a los mecanismos establecidos en los otros foros respecto del mismo objeto, definido en los términos del artículo 14 de este Protocolo.

No obstante, en el marco de lo establecido en este numeral, el Consejo del Mercado Común reglamentará los aspectos relativos a la opción de foro.

⁸⁶⁶ These freedoms are known as ‘the three fundamental freedoms’ and are foreseen in Art. 1 of the Treaty of Asunción.

7.1. The relationship between MERCOSUR Member States and the remaining WTO Members

In the case of relationships involving a MERCOSUR Member State and a Non-Member of the bloc that is a WTO Member, both the MERCOSUR law priority and the bloc's jurisdiction do not apply. Therefore, WTO rules have primacy. This is what one can interpret from the text of Art. 30, § 4, item (a) of the VCLT of 1969,⁸⁶⁷⁻⁸⁶⁸ which establishes that the reciprocal relations of States should be governed by treaties common to them. Furthermore, MERCOSUR law is not intended to govern relations with Non-Member States.

Within the MERCOSUR there is no specific body or organ to monitor the agreements that each of its Member States have concluded with Non-Members. So, taking measures in cases of incompatibility is complicated. Nonetheless, agreements that are incompatible with MERCOSUR law must be renegotiated. A renegotiation will depend on the approval of both parties.

8. MERCOSUR Law and Brazilian Constitutional Law

This section analyses the relationship between MERCOSUR law and Brazilian constitutional law. For the wider relationship between Brazilian constitutional law and international treaties as a whole, please see the specific section on the issue.

There is no provision in the Brazilian Federal Constitution that mentions anything about the MERCOSUR and its law.⁸⁶⁹ Therefore, in order to study the relationship between MERCOSUR law and Brazilian constitutional law, it is important to firstly have in mind what the sole paragraph of Art. 4 of the Brazilian Constitution, which can be found under the title about the country's fundamental principles, determines, namely:

⁸⁶⁷ When the parties to the later treaty do not include all the parties to the earlier one:

(a) as between States Parties to both treaties the same rule applies as in paragraph 3;

⁸⁶⁸ Paragraph 3 says "When all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended in operation under article 59, the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty."

⁸⁶⁹ Similarly to the WTO and WTO law.

“The international relations of the Federative Republic of Brazil are governed by the following principles:

(...)

Sole Paragraph. The Federative Republic of Brazil shall seek the economic, political, social and cultural integration of the peoples of Latin America, viewing the formation of a Latin-American community of nations.”⁸⁷⁰

Accordingly, the Brazilian Constitution supports a ‘Latin-American community of nations’. The text, however, is silent with regard to the precise form of integration that Brazil would eventually support – i.e., one following the traditional sovereignty principles or an integration with the transfer of parts of the country’s national sovereignty to supranational decision-making institutions, as the Argentinean, Paraguayan and Venezuelan Constitutions make clear. Some Brazilian authors consider the sole paragraph of Art. 4 as not directly applicable because there is no infra-constitutional legislation on the matter. A historical analysis of the time in which the Brazilian Constitution has been written, however, allows a different interpretation. The year 1987 is marked in the European Communities by the coming into force of the Single European Act (SEA)⁸⁷¹ and many debates about a European Union.⁸⁷² Consequently, the SEA, which definitely brought rich discussions to the international scenario on the next legal and procedural steps of the European Communities, came into effect one year before the promulgation of the Brazilian Constitution.⁸⁷³

⁸⁷⁰ Art. 4º. *A República Federativa do Brasil rege-se nas suas relações internacionais pelos seguintes princípios:*

(...)

Parágrafo único. A República Federativa do Brasil buscará a integração econômica, política, social e cultural dos povos da América Latina, visando à formação de uma comunidade latino-americana de nações.

⁸⁷¹ The Single European Act came into effect on 1st July 1987, revised the 1957 Treaty of Rome and was intended to establish a European Common Market by 31st December 1992.

⁸⁷² The European Union was created later on in 1992 by the Treaty of Maastricht, which came into effect in November 1993, that is, less than one year after the establishment of the European Common Market through the SEA.

⁸⁷³ The Brazilian Constitution was promulgated on 5th October 1988.

Thus, considering that the Brazilian constituent legislators studied the constitutions of, for instance, Germany, France, Italy, Spain and Portugal before 1988 in order to write the 1988 Federal Constitution, it can be assumed that they were aware of both the EC integration process and the further developments taking place in those years in Europe.

Of course, it might be convenient to the Brazilian Executive Power and part of the judiciary to accept as true that the constituent legislators were not aware of the integration process in Europe and that they did not know that the EC Member States passed parts of their sovereignty to supranational institutions with decision-making power. Indeed there is a certain lack of clearness in the constitutional text that may possibly reflect an imprecision and not the true will of the Brazilian legislators to form a Latin-American community of nations with its corresponding juridical effects. In my opinion, however, acknowledging one or the other view concerning the legislators is a mistaken interpretation that disguises reality. Hence, a pro-MERCOSUR interpretation of the sole paragraph of Art. 4 is in the hands of national judges. Moreover, this ‘Latin-American community of nations’, whose ‘embryo’ might be the MERCOSUR and its law, will require its Member States to transfer parts of their sovereignty to institutions with decision-making power, otherwise this ‘community of nations’ will not be successful. The future community rules must also be uniformly interpreted and applied (i.e., consistent interpretation), something that national courts cannot carry out alone and makes a supranational court of justice necessary. This new court may well develop from the existing *Tribunal Permanente de Revisión*.

In all likelihood, the most delicate challenge for the MERCOSUR within the Brazilian constitutional law concerns the content of certain specific rights, freedoms and guarantees which, without exceptions, cannot be infringed, since the Brazilian Constitution has a core of provisions that cannot be changed. These provisions are listed in Art. 60, § 4, I, II, III and IV, entail undefined concepts, ample content and influence the whole Constitution, as follows:

“Art. 60. The Constitution may be amended on the proposal of:
(...)”

§ 4 - No proposal of amendment shall be considered if aimed at abolishing:

I - the federative form of State;

II - the direct, secret, universal and periodic vote;

III - the separation of the Government Powers;

IV - individual rights and guarantees.”⁸⁷⁴

The provisions above are known in Brazil as ‘*cláusulas pétreas*’⁸⁷⁵ and the National Congress cannot even deliberate about them.

While clauses II and III aforementioned are clear and their objectives are easy to identify, clauses I and IV are broad and not clear about their extensions, something that may create doubts with regard to the sole paragraph of Art. 4. Specifically regarding clause I, one may wonder what exactly the constituent legislators had in mind and what their conception of sovereignty was. While some readers may presume that the words follow *Jean Bodin*’s theory of sovereignty, others may think about the European Community sovereignty of the 1980s. Again my opinion is that the legislators of the Brazilian Constitution were aware about the community experiences in Europe and, because of that, Art. 60, § 4, I above should be no barrier to a ‘Latin-American community of nations’. This view is in accordance with the important fact that Art. 4 and its sole paragraph are under the ‘title one’ of the Constitution about the country’s fundamental principles⁸⁷⁶ while Art. 60 is under the title on the ‘Organisation of the Powers’ and more specifically in subsection II (Amendments to the Constitution) of section VIII (Legislative Process), explicitly under the hierarchy of the articles under the title on the country’s fundamental principles.

⁸⁷⁴ Art. 60. A Constituição poderá ser emendada mediante proposta:

(...)

§ 4º - Não será objeto de deliberação a proposta de emenda tendente a abolir:

I - a forma federativa de Estado;

II - o voto direto, secreto, universal e periódico;

III - a separação dos Poderes;

IV - os direitos e garantias individuais.

⁸⁷⁵ The direct translation of ‘*cláusula pétrea*’ is ‘stone clauses’. While this direct translation means a clause that is as immutable as a stone, it is the equivalent to a fundamental clause.

⁸⁷⁶ “*Título I - Dos Princípios Fundamentais*”, in Portuguese. Title one has only Articles 1, 2, 3 and 4.

The Brazilian Constitution also has an extensive list of individual rights, which are listed in the chapter ‘Individual and Collective Rights and Duties’, to be found under the title ‘Fundamental Rights and Guarantees’.⁸⁷⁷ So, here there is another possible concern in terms of national sovereignty and international rule of law. We may say, however, that concepts and values must progress throughout history, and countries with common law traditions are examples that individual rights and guarantees can be adjusted and re-interpreted along with the times. As I have already mentioned in the section of this thesis entitled ‘Historical Constitutional Analysis about Access to Justice in Brazil’, according to *Savigny*, “the locus of law is not state legislation but the daily customs and practices of a people and the notions and understandings prevalent among them”.⁸⁷⁸ So, could a sort of common law approach help the relation between Brazilian and MERCOSUR law? If one takes the ECJ/CJEU and national courts of EU Member States as references, one can easily identify their more common law rather than civil law approach towards EU law, even though most EU Member States are civil law countries.

Although excluding certain subjects and contents from constitutional amendments can be considered justifiable in several countries, the scope of the exclusions in Brazil has the ability to preclude renovations in the structure of its national constitution. Hence, re-interpreting the Brazilian constitution or altering it without disrespecting Art. 60, § 4 and its clauses I to IV is important for MERCOSUR law, WTO law and general international law.⁸⁷⁹ Doing this will of course also better prepare the Brazilian judiciary with regard to potential MERCOSUR supranational decision-making organs.

Also Art. 5, XXXV of the Brazilian Constitution⁸⁸⁰ should be interpreted in another way. The problem of the provision concerns the interpretation of which ‘judicial

⁸⁷⁷ There are more than 80 individual and collective rights, although Brazil is not exactly a ‘champion’ in terms of social equalities. For more details, see the long Art. 5 of the Federal Constitution.

⁸⁷⁸ Berkowitz, 2005, p. 113, and Reiss, 1955, 38 f. and p. 205 f., both quoted in Mautner, p. 845.

⁸⁷⁹ An uncomplicated way for the alterations would be adding one or more paragraphs to Art. 60.

⁸⁸⁰ Article 5. All persons are equal before the law, without any distinction whatsoever, Brazilians and foreigners residing in the country being ensured of inviolability of the right to life, to liberty, to equality, to security and to property, on the following terms:

(...)

XXXV - the law shall not exclude any injury or threat to a right from the consideration of the Judicial Power;

power' is meant. According to Brazilian constitutionalists, the expression means the national judicial power, even though the Constitution does not state that. In reality, Art. 5 declares that access to justice is a fundamental right of all persons and does not say anything about jurisdictions. In my view, nationalist Brazilian constitutionalists have a mistaken interpretation that, as I have pointed out before with regard to the sole paragraph of Art. 4, is disguising reality. Still, it is prudent and adequate to complement the text with an additional rule (or some rules) regarding foreign courts. Such an insertion would expand the right of access to justice, would not restrict Brazilian citizens and foreigners living in Brazil to access the Brazilian judiciary and would strengthen MERCOSUR rule of law. Actually, improving Art. 5, XXXV would transfer certain sorts of cases to specific courts with specialised competencies and, consequently, able to form uniform case law. Uniform interpretation of the law and, as a result, uniform case law have been sought since the negotiations that preceded the signing of the Protocol of Olivos.⁸⁸¹

Hence, the section about the allocation of powers of the Federal Supreme Court (STF) should also be changed or rather complemented in order to transfer part (or parts) of its competence (or competencies) to a supranational legal order. And, since the Argentinean Constitution mentions a supranational legal order under the circumstances of *reciprocidad*⁸⁸² and *igualdad*⁸⁸³, and the Paraguayan Constitution mentions a supranational legal order under *condiciones de igualdad con otros Estados*,⁸⁸⁴ it is necessary to introduce a similar rule in both Brazilian and Uruguayan Constitutions,⁸⁸⁵ which still do not have any clear provisions about the supremacy of international treaties⁸⁸⁶ over their respective national laws⁸⁸⁷ and, if they remain unchanged, are going to impede the creation of what the Brazilian Constitution itself calls a 'Latin-American community of nations' – and, as mentioned before, the MERCOSUR might be the embryo of this. Accordingly, Art. 4 of the Brazilian

⁸⁸¹ For more details, see the 'Advisory Opinions' section of this thesis.

⁸⁸² Reciprocity, in English.

⁸⁸³ Equality, in English.

⁸⁸⁴ Equal conditions with other States, in English.

⁸⁸⁵ As has already been explained here, in the section 'Legal Sources of the Mercosur' of this chapter, the Constitution of Venezuela explicitly favours a supranational legal order. Furthermore, there are no requirements like reciprocity, equality or equal conditions with other countries.

⁸⁸⁶ In the case of Brazil, human rights treaties have constitutional status.

⁸⁸⁷ For details on the case of Brazil, please consult the section 'Brazilian Constitutional Law and International Treaties' of this thesis.

Magna Carta, which raises doubts among jurists about the extent to which it can be interpreted, seems to be the most appropriate article for the new rule on supremacy. This is because Art. 4 is under ‘title one’ of the Brazilian Constitution, which is about the country’s fundamental principles, lists how the international relations of the Federative Republic of Brazil are supposed to be governed and its sole paragraph clearly determines that Brazil “shall seek the economic, political, social and cultural integration of the peoples of Latin America, viewing the formation of a Latin-American community of nations”. In other words, the interpretation of Art. 4 can and has to be broadened.⁸⁸⁸

In sum, adjustments have to be made in order to allow Brazil to participate in a more developed MERCOSUR, open a way to a supranational legal order and allow international rule of law. Furthermore, the preamble of the Treaty of Asunción⁸⁸⁹

⁸⁸⁸ This is the complete text of Art. 4 in Portuguese:

“Art. 4º *A República Federativa do Brasil rege-se nas suas relações internacionais pelos seguintes princípios:*

I - independência nacional;

II - prevalência dos direitos humanos;

III - autodeterminação dos povos;

IV - não-intervenção;

V - igualdade entre os Estados;

VI - defesa da paz;

VII - solução pacífica dos conflitos;

VIII - repúdio ao terrorismo e ao racismo;

IX - cooperação entre os povos para o progresso da humanidade;

X - concessão de asilo político.

Parágrafo único. A República Federativa do Brasil buscará a integração econômica, política, social e cultural dos povos da América Latina, visando à formação de uma comunidade latino-americana de nações.”

⁸⁸⁹ The English version of the preamble of the Treaty of Asunción:

“Treaty Establishing a Common Market between the Argentine Republic, the Federal Republic of Brazil, the Republic of Paraguay and the Eastern Republic of Uruguay, The Argentine Republic, the Federative Republic of Brazil, the Republic of Paraguay and the Eastern Republic of Uruguay, hereinafter referred to as the “States Parties”,

CONSIDERING that the expansion of their domestic markets, through integration, is a vital prerequisite for accelerating their processes of economic development with social justice,

BELIEVING that this objective must be achieved by making optimum use of available resources, preserving the environment, improving physical links, coordinating macroeconomic policies and ensuring complementarity between the different sectors of the economy, based on the principles of gradualism, flexibility and balance,

BEARING IN MIND international trends, particularly the integration of large economic areas, and the importance of securing their countries a proper place in the international economy,

BELIEVING that this integration process is an appropriate response to such trends,

AWARE that this Treaty must be viewed as a further step in efforts gradually to bring about Latin American integration, in keeping with the objectives of the Montevideo Treaty in 1980,

CONVINCED of the need to promote the scientific and technological development of the States Parties and to modernize their economies in order to expand the supply and improve the quality of available goods and services, with a view to enhancing the living conditions of their populations,

mentions that the expansion of the existing dimensions of national markets through an integration process is a key condition to accelerate the process of economic development with social justice.

9. MERCOSUR Economic Freedoms

The Treaty of Asunción, as I have argued in the section on the purposes of the MERCOSUR, laid the foundation for the establishment of a common market based on 3 fundamental freedoms: (1) free movement of goods, (2) services and (3) factors of production between the Member States.⁸⁹⁰ I have also already explained that a group of authors⁸⁹¹ believes, however, that capital and labour are also covered by ‘factors of production’. I am a member of this group because I believe that the complete interpretation on MERCOSUR economic freedoms should be understood as follows: free movement of goods, services, capital, labour and persons, and thus also the right of establishment. It can be implied, in consequence, that the MERCOSUR economic

REAFFIRMING their political will to lay the bases for increasingly close ties between their peoples, with a view to achieving the above-mentioned objectives,
HEREBY AGREE AS FOLLOWS:

(...)”

⁸⁹⁰ Art. 1 of the Treaty of Asunción: *Los Estados Partes deciden constituir un Mercado Común, que debe estar conformado al 31 de diciembre de 1994, el que se denominará “Mercado Común del Sur”(MERCOSUR).*

Este Mercado Común implica:

- *La libre circulación de bienes, servicios y factores productivos entre los países, através, entre otros, de la eliminación de los derechos aduaneros y restricciones no arancelarias a la circulación de mercaderías y de cualquier otra medida equivalente:*

- *El establecimiento de un arancel externo común y la adopción de una política comercial común con relación a terceros Estados o agrupaciones de Estados y la coordinación de posiciones en foros económicos comerciales regionales e internacionales;*

- *La coordinación de políticas macroeconómicas y sectoriales entre los Estados*

Partes: de comercio exterior, agrícola, industrial, fiscal, monetaria, cambiaria y de capitales, de servicios, aduanera, de transportes y comunicaciones y otras que se acuerden, a fin de asegurar condiciones adecuadas de competencia entre los Estados Partes;

- *El compromiso de los Estados Partes de armonizar sus legislaciones en las áreas pertinentes, para lograr el fortalecimiento del proceso de integración.*

⁸⁹¹ Silva, Elaine Ramos da, *Rechtsangleichung im Mercosul: Perspektiven für das Niederlassungsrecht von Gesellschaften anhand von Erfahrungen in der Europäischen Union*, Baden-Baden, 2002, p. 37; Jaeger Junior, Augusto, *MERCOSUL e a livre circulação de pessoas*, São Paulo, 2000, p. 116 ff; Faria, José Ângelo Estrella, *O Mercosul: Princípios, Finalidade e Alcance do Tratado de Assunção*, Brasília, 1993, p. 41; Salomão Filho, Calixto/Samtleben, Jürgen, *Der Südamerikanische Gemeinsame Markt – eine rechtliche Analyse des MERCOSUR*, in: *Wertpapier-Mitteilungen (WM)*, 1992, Nr. 33, p. 1342. One can also add Fuders, Felix, *Die Wirtschaftsverfassung des Mercosur: eine rechtsvergleichende Darstellung unter besonderer Berücksichtigung des Rechts der Europäischen Union*, Berlin, Duncker & Humblot, 2008, and Fuders, Felix, *Economic Freedoms in MERCOSUR*, in: Franca Filho, Marcilio T., et al (Eds.), *The Law of Mercosur*, Oxford/Portland (Oregon), Hart, 2010, p. 87 et seq.

freedoms are almost exactly the same as the fundamental freedoms of Art. 3 (c) of the Treaty Establishing the European Community (i.e., the former EC Treaty).⁸⁹²

Therefore, the MERCOSUR has 5 economic freedoms: (1) the free movement of persons (also called by some authors as ‘free movement of workers’),⁸⁹³ (2) freedom of establishment and to provide services, (3) free movement of capital, (4) free movement of goods and (5) freedom of competition. Each of these freedoms will be discussed in 5 specific subsections. As I have already argued in the section about the purposes of the MERCOSUR, the Treaty of Asunción is a framework treaty rather than a final treaty, many of its provisions are programmatic and some are simply transitory.⁸⁹⁴ Furthermore, while the Treaty of Asunción has the free movement of goods in its text, it does not mention anything about the freedom to provide services, the freedom of establishment, the free movement of persons and the free movement of capital.

The sections below analyse each of the 5 economic freedoms listed above.

9.1. Free Movement of Persons

The freedom of movement of persons directly benefits citizens of the integration process, the national workers of the Member States and their families, including those residing in a Member State that is not their Member State of origin. Individuals should not be subject to internal borders controls (i.e., Member State to Member State borders) in order to work, invest and reside, because any integration is made by people, is meant for people and is based on people.⁸⁹⁵ The free movement of persons also indirectly benefits legal persons, as these are owned and legally represented by

⁸⁹² Art. 3, paragraph 1, section (c) of the EC Treaty:

“For the purposes set out in Article 2, the activities of the Community shall include, as provided in this Treaty and in accordance with the timetable set out therein:

(...)

(c) an internal market characterised by the abolition, as between Member States, of obstacles to the free movement of goods, persons, services and capital;”

⁸⁹³ E.g., Fuders, Felix, *Economic Freedoms in MERCOSUR*, in: Franca Filho, Marcílio T., et al (Eds.), *The Law of Mercosur*, Oxford/Portland (Oregon), Hart, 2010, p. 106.

⁸⁹⁴ One example is the text of Art. 1 of the Treaty of Asunción.

⁸⁹⁵ Jaeger Junior, 2002, p. 39.

natural persons, and need employees (i.e., natural persons) in order to function. The MERCOSUR Member States, MERCOSUR organs and all private parties that operate in the bloc are required to respect the freedom of movement of persons. On the other hand, as *Jaeger Junior*⁸⁹⁶ highlights, the Asunción Treaty is silent about labour law and quality of life.

The Multilateral Agreement on Social Security of 1997 is the main legislation governing the movement of natural persons in the MERCOSUR. There is additionally a special identity card for residents of the border area between Uruguay and Brazil. These border residents are often called “*doble chapas*” (‘double sheets’ or ‘double plates’, in English). However, the identity card is valid only for municipalities with land border (‘dry border’). This is the case of Santana do Livramento (Brazil) and Rivera (Uruguay), for example. A person simply has to walk across a normal street in order to enter the other city of the neighbouring country. This identity card also allows the opening of bank accounts, the purchase of real estate and the opening of businesses.

9.2. Freedom to Provide Services and Freedom of Establishment

In 1997, in order to liberalise services in the MERCOSUR, the Montevideo Protocol on Trade in Services of the MERCOSUR was created. It was inspired by the General Agreement on Trade in Service (GATS) but defines neither the concept of service nor the concept of provision of services. Differently from the European Communities, which has implemented a gradual liberalisation of services with different documents aimed at specific economic sectors (i.e., sector by sector), the liberalisation of services in the MERCOSUR is endeavoured through a single document.

⁸⁹⁶ *Ibid.*

9.3. Free Movement of Capital

A differentiation between capital itself and payments, as there is in the European Union, does not exist in the MERCOSUR. Decision Nr. 8/93 of the CMC was initially adopted with the purpose of ensuring to investors their access to important information through an obligation imposed to institutions that issue shares to regularly and uniformly supply information. The MERCOSUR has also adopted two harmonisation measures relating to foreign investments: the Protocol of Colonia for the Promotion and Reciprocal Protection of Investments in the MERCOSUR and the Protocol of Buenos Aires for the Promotion and Protection of Investments from Countries that are not MERCOSUR Member States. While the Protocol of Colonia obliges Member States to treat investors from any Member State in the same way they treat their national investors and even contains a specific prohibition of discrimination on grounds of nationality, the Protocol of Buenos Aires reproduces in its text almost entirely the text of the Protocol of Colonia, but its addressees are investors from countries that are not members of the MERCOSUR.

9.4. Free Movement of Goods

The free movement of goods can be defined as the core and the foundation of a process of economic integration. Its main instrument in the MERCOSUR is the '*Programa de Liberación Comercial*' (i.e., 'Program of Trade Liberation', in English), which is one of the annexes of the Treaty of Asunción and, consequently, has immediate applicability in all MERCOSUR Member States. The free movement of goods relates to goods with economic value that have been produced within the territory of the MERCOSUR or are in free circulation within it. The beneficiaries of this freedom are the citizens of the MERCOSUR Member States and citizens of countries that are not Member States, including non-residents of the bloc, who accompany the transport of the goods within the MERCOSUR.

9.5. Freedom of Competition

The main instrument to protect freedom of competition within the MERCOSUR is its Protocol for the Protection of Competition. This protocol defines the practices that are contrary to competition, which can be summarised in two groups as follows: (a) all practices whose purpose or effect are limiting, restricting, falsifying or distorting competition or free market access, and (b) the abuse of a dominant position in the relevant market of goods and services affecting, as a result, trade between MERCOSUR Member States. The protocol also states that the MERCOSUR Trade Commission and the Protection of Competition Committee are responsible for implementing the protocol's norms. Furthermore, it determines that national agencies should take all the necessary measures in order to create a cooperation system among themselves in a sort of network with the purpose of implementing the protocol.

10. MERCOSUR Law and Human Rights

The aim of this section is to address and assess human rights in the MERCOSUR. This will be performed by presenting and studying substantive law and a case on the issue, namely the *Bridges Case*. Accordingly, I would like to begin the analysis with the list of human rights instruments to which all MERCOSUR Member States are signatories:

- Universal Declaration of Human Rights;⁸⁹⁷
- International Covenant on Civil and Political Rights;⁸⁹⁸

⁸⁹⁷ Human rights are foreseen in Articles 8, 9 and 10.

Art. 8: Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.

Art. 9: No one shall be subjected to arbitrary arrest, detention or exile.

Art. 10: Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.

⁸⁹⁸ Art. 14 (1) defines that every person has to be treated equally before courts and tribunals.

Art. 14 (1): All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (*ordre public*) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special

- American Convention on Human Rights;⁸⁹⁹
- American Declaration of the Rights and Duties of Man;⁹⁰⁰
- '*Declaración Sociolaboral del Mercosur*' ('Social-Labour Declaration of the MERCOSUR', in English),⁹⁰¹ which was based on international standards to which all MERCOSUR Member States are parties⁹⁰² and commits in its preamble all Member States to guarantee fundamental rights;⁹⁰³
- '*Acuerdo sobre Regularización Migratoria Interna de Ciudadanos del Mercosur*' ('Agreement on the Regularization of Internal Migration in the MERCOSUR', in English), which is not in force yet;⁹⁰⁴
- '*Acuerdo Contra el Tráfico Ilícito de Migrantes entre los Estados Partes del Mercosur*' ('Agreement against the Illicit Traffic of Migrants among the MERCOSUR Member States', in English), which is not in force yet;⁹⁰⁵

circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.

⁸⁹⁹ Article 8 is about the right to a fair trial. It has five paragraphs and the most important of them, for the purposes of this thesis, is paragraph one.

Art. 8 (1): Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labour, fiscal, or any other nature.

⁹⁰⁰ Art. XVIII. Every person may resort to the courts to ensure respect for his legal rights. There should likewise be available to him a simple, brief procedure whereby the courts will protect him from acts of authority that, to his prejudice, violate any fundamental constitutional rights.

⁹⁰¹ Signed in Brasília on 10th December 1998, it was the first instrument enacted by the Mercosur to mention human rights.

⁹⁰² A very rational and speedy solution, which did not make analyses of national legislations or legislative reforms necessary. The Social-Labour Declaration of the Mercosur is a soft law instrument (i.e. not directly enforceable) and has been meant for legally recognising the freedom of circulation of persons, especially workers, who are considered economic actors in the bloc.

⁹⁰³ Parts of the preamble of the '*Declaración Sociolaboral del Mercosur*' state the following:

Considerando que los Estados Partes están comprometidos con las declaraciones, pactos, protocolos y otros tratados que integran el patrimonio jurídico de la Humanidad, entre ellos la Declaración Universal de los Derechos Humanos (1948), el Pacto Internacional de los Derechos Civiles y Políticos (1966), el Pacto Internacional de los Derechos Económicos, Sociales y Culturales (1966), la Declaración Americana de Derechos y Obligaciones del Hombre (1948), la Carta Interamericana de Garantías Sociales (1948), la Carta de la Organización de los Estados Americanos - OEA (1948), la Convención Americana de Derechos Humanos sobre Derechos Económicos, Sociales y Culturales (1988);

(...)

Considerando que la adhesión de los Estados Partes a los principios de la democracia política y del Estado de Derecho y del respeto irrestricto a los derechos civiles y políticos de la persona humana constituye base irrenunciable del proyecto de integración;

⁹⁰⁴ The agreement was signed in Brasília on 5th December 2002, but the Argentinean and Paraguayan ratifications are pending. Like the Social-Labour Declaration of the Mercosur, this agreement is meant for legally recognising the freedom of circulation of persons.

⁹⁰⁵ The agreement was signed in Belo Horizonte on 16th December 2004, but only Argentina has ratified it so far. It concerns human rights of victims of trafficking.

- '*Protocolo de Asunción sobre Compromiso con la Promoción de los Derechos Humanos del Mercosur*' ('Protocol of Asunción on the Commitment to the Promotion and Protection of Human Rights in the MERCOSUR', in English), which deduces the protection of human rights from the protection of democracy⁹⁰⁶ but is not in force yet;⁹⁰⁷
- '*Acuerdo entre los Estados Partes del Mercosur y Estados Asociados sobre Cooperación Regional para la Protección de los Derechos de Niños, Niñas y Adolescentes en Situación de Vulnerabilidad*' ('Agreement on Regional Cooperation for the Protection of Children in Situations of Vulnerability', in English), which is not in force yet;⁹⁰⁸
- '*Acuerdo para la Implementación de Bases de Datos Compartidas de Niños, Niñas y Adolescentes en Situación de Vulnerabilidad del Mercosur y Estados Asociados*' ('Agreement on the Implementation of Shared Databases of Children in Situations of Vulnerability in MERCOSUR and Associated States', in English), which is not in force yet;⁹⁰⁹
- Other international instruments.

One can easily notice from the list above that several human rights instruments are not in force yet and none of the MERCOSUR ones have come into force. So, it can be implied that, as long as they are not in force, human rights will continue to have no major role in the bloc. Persons will, as a result, continue to depend on the human rights recognised at the national law of every MERCOSUR Member State and their national courts. The existence of the instruments listed above, nevertheless, does also reveal that there is a sort of mutual interest in the bloc to make human rights part of trade policy.

⁹⁰⁶ Preamble of the Protocol of Asunción on the Commitment to the Promotion and Protection of Human Rights in the Mercosur.

⁹⁰⁷ It was signed in June 2005, but is not in force yet because the Brazilian and Uruguayan ratifications are still pending. For the current situation, see *Mercosur, Estado de Ratificaciones y Vigencias de Tratados y Protocolos del Mercosur y Estados Asociados*, available at www.mre.gov.py/dependencias/tratados/mercosur/registro%20mercosur/mercosurprincipal.htm.

⁹⁰⁸ The agreement was signed in San Miguel de Tucumán on 30th June 2008, but not ratified by all Mercosur Member States and the Associated States Bolivia, Chile, Colombia, Ecuador and Peru. It emphasises the necessity to safeguard children's rights as protected by other international instruments.

⁹⁰⁹ The agreement was signed in San Miguel de Tucumán on 30th June 2008, but not ratified by all Mercosur Member States and the Associated States Bolivia, Chile, Colombia, Ecuador and Peru.

As I have already mentioned in the subsection ‘Trade Law and Access to Justice’ of this thesis’ in Chapter II, there is no disagreement that States must protect the human rights of their citizens. In view of this common understanding, one may assume that human rights protection is transferable to blocs of regional integration. It is not acceptable that States respect human rights only domestically. This brings back to the fore the issue of ‘constitutionalisation’, but now specifically with regard to regional integration projects among States, which *Casal*⁹¹⁰ defines as the constitutionalisation of integration processes. In my view, this type of ‘constitutionalisation’ can contribute to settle disputes involving trade matters before courts, tribunals, and arbitral tribunals through rulings that respect human rights law above everything else.

With regard to State responsibility concerning human rights issues, *Antônio Augusto Cançado Trindade*, who is a former president and judge of the Inter-American Court of Human Rights and is currently judge of the International Court of Justice, offers a noteworthy explanation. According to him, it is nowadays acknowledged that the State is responsible for all its acts both *jure gestionis* and *jure imperii*, besides also being responsible for all its omissions.⁹¹¹

I agree with *Roff* when she argues that:

“if we grant that justice is universal, and many of the international treaties and norms regarding the protection of human rights espouse this position, then the state system with its unidirectional focus is incomplete and will only perpetuate problems of justice.”⁹¹²

The competent court for human rights issues involving a MERCOSUR Member State as defendant and a citizen of it as plaintiff is the Inter-American Court of Human Rights, which has been created to interpret and enforce the provisions of the

⁹¹⁰ Casal, Jesús M., *Los derechos humanos en los procesos de integración*, in: *Estudios Constitucionales*, Centro de Estudios Constitucionales, Universidad de Talca, Year 3, Nr. 2, Providencia, 2005, p. 254.

⁹¹¹ Trindade, Antônio A. C., *International Law for Humankind: Towards a New Jus Gentium – General Course on Public International Law – Part I*, in: 316 *Recueil des Cours de l’Académie de Droit International de la Haye* (2005), ch. IX, pp. 256-257, quoted in Trindade, Antônio A. C., *The Access of Individuals to International Justice*, Oxford; New York, 2011, p. 2.

⁹¹² Roff, Heather M., p. 1.

American Convention on Human Rights. According to *Trindade*, “in the case of a violation of human rights, the *direct access* of the individual to international jurisdiction is thus fully justified, to vindicate such rights, even against his own State”.⁹¹³ About the personality and capacity of the individual at the international level, which are both still very controversial matters, *Trindade* defends that

“The respect for the individual’s personality at international level is instrumentalized by the international right of individual petition. It is for this reason that, in my Concurring Opinion in the case *Castillo Petruzzi and Others versus Peru* (Preliminary Objections, Judgment of 04 September 1998) before the Inter-American Court of Human Rights, urged by the circumstances of the *cas d’espèce*, I saw it fit to characterize the international right of individual petition as a *fundamental clause* (*cláusula pétrea*) of the human rights treaties which provide for it...”⁹¹⁴

With reference to access to justice, the execution of the judgements of the Inter-American Court of Human Rights has always depended on the respondent State. This changed on 28th November 2003 with the landmark judgement on jurisdiction in the case *Baena Ricardo and Others versus Panama*, as the court asserted *ex officio* its competence to supervise the execution of its own judgements and affirmed “that, in its exercise of that competence, it is entitled to request of the responsible States reports on the reparations measures, to evaluate such reports, and to issue instructions and resolutions on compliance (or otherwise) with its judgments”.⁹¹⁵ Since then the court has been filling a gap in the Inter-American human rights system, “which, unlike its counterpart the European system, is not endowed with an organ equivalent to the Committee of Ministers”.⁹¹⁶

⁹¹³ Trindade, Antônio A. C., *The Access of Individuals to International Justice*, Oxford; New York, 2011, p. 2 f. The author quotes Glaser, G., *Les droits de l’homme à la lumière du droit international positif*, in: *Mélanges offerts à H. Rolin – Problèmes de droit de gens*, Paris, Pédone, 1964, pp. 117-118, and cf. pp. 105-106 and 114-116.

⁹¹⁴ *Ibid.*, p. 13.

⁹¹⁵ *Ibid.*, p. 120.

⁹¹⁶ *Ibid.*

One can, nevertheless, identify some human rights ‘traces’ in MERCOSUR texts. This is the case of paragraph six of the preamble of the Treaty of Asunción, which states that “(...) with a view to enhancing the living conditions of their populations”,⁹¹⁷ and Art. 34(1) of the Protocol of Olivos, according to which *Ad Hoc* arbitral tribunals and the TPR should decide disputes in accordance with the Treaty of Asunción (...) and principles and provisions of international law that prove to be relevant.⁹¹⁸ On the other hand, it must be highlighted that, although there is no human rights harmonisation in the bloc, MERCOSUR cooperation agreements with other blocs make express reference to human rights, as protected by the Universal Declaration of Human Rights, and are considered an essential element of the agreements.⁹¹⁹

The ‘*Comisión Parlamentaria Conjunta*’ (CPC) – i.e., ‘Joint Parliamentary Commission’, in English – has promoted democratic values in the bloc and emphasised that “democracy is a *conditio sine qua non* for the success of the integration process”.⁹²⁰ The emphasis towards democracy directed some attention to human rights issues too and a new protocol – i.e., the ‘Protocol of Ushuaia on Democratic Commitment within the MERCOSUR’ – has been created and, after being ratified by all initial Member States (i.e., all except Venezuela), entered into force in January 2002. Some of the protocol’s goals are the promotion of democracy and human rights to improve the social and economic stability of the bloc and, as a result, advance the integration process.

⁹¹⁷ The complete text of the sixth paragraph in Spanish, which is one of its original languages, is as follows:

“*CONVENCIDOS de la necesidad de promover el desarrollo científico y tecnológico de los Estados Partes y de modernizar sus economías para ampliar la oferta y la calidad de los bienes y servicios disponibles a fin de mejorar las condiciones de vida de sus habitantes.*”

⁹¹⁸ The complete text of Art. 34(1) of the Protocol of Olivos in Spanish is as follows:

“*Los Tribunales Arbitrales Ad Hoc y el Tribunal Permanente de Revisión decidirán la controversia en base al Tratado de Asunción, al Protocolo de Ouro Preto, a los protocolos y acuerdos celebrados en el marco del Tratado de Asunción, a las Decisiones del Consejo del Mercado Común, a las Resoluciones del Grupo Mercado Común y a las Directivas de la Comisión de Comercio del Mercosur así como a los principios y disposiciones de Derecho Internacional aplicables a la materia.*”

⁹¹⁹ Marques, Eduardo Lorenzetti, *Direitos Humanos no Mercosul*, in: Casella, Paulo Borba (Ed.), *Mercosul: Integração Regional e Globalização*, Rio de Janeiro, 2000, p. 535; and Sant’Anna, Rosa, *Mercosul: em busca de uma identidade humanitária*, in: Casella, Paulo Borba (Ed.), *Mercosul: Integração Regional e Globalização*, Rio de Janeiro, 2000, p. 982, quoted in Lixinski, Lucas, *Human Rights in Mercosur*, in: Franca Filho, Marcílio Toscano et. al. (Eds.), *The Law of Mercosur*, Oxford, 2010, p. 354.

⁹²⁰ Lixinski, *Human Rights in Mercosur*, 2010, p. 353.

The CPC was expanded in 2005 and became the PARLASUR (i.e., the Parliament of the MERCOSUR). Many of the CPC functions are executed by PARLASUR and human rights are in its agenda. In fact, PARLASUR has a specific commission on citizenship and human rights.

The supreme courts of the MERCOSUR Member States have also realised the human rights gap in the bloc and agreed in 2008 to create a working group to draft a MERCOSUR Charter of Fundamental Rights, which may possibly bear a resemblance to the EU Charter on Fundamental Rights in terms of scope and reach.⁹²¹ Such a resemblance is highly possible to happen based on the past inspirations that the MERCOSUR has taken in the EC and EU. The draft, however, has not been finished yet and it is too early to know if the charter is going to protect citizens only from the public power of their own Member States or also from the power of MERCOSUR law and MERCOSUR institutions.

Concerning human rights case law in the MERCOSUR dispute settlement mechanism, reference has to be made to the *Bridges Case*, which will be examined next.

10.1. The *Bridges Case*

Human rights have been addressed by an *Ad Hoc* arbitration tribunal due to a complaint of Uruguay concerning a traffic obstruction caused by the blockades of two bridges linking Argentina and Uruguay over the Uruguay river, which demarcates the border between these countries. The case became known in English as the *Bridges Case*. Blockades took place several times between December 2005 and May 2006, and were caused by groups of environmentalists protesting against the construction of pulp mills on the Uruguay river. According to the Uruguayan Republic:

“Argentinean authorities did not adopt the appropriate measures to halt the interference with the traffic on the bridges, even though, allegedly,

⁹²¹ *Ibid.*, p. 354.

the number of protesters was very small and the situation could easily have been handled by law enforcement authorities.”⁹²²

Uruguay also argued that damages to many businesses working with imports and exports of goods were caused, and ground transport of people, among them tourists, and goods was directly affected. This, as a result, supposedly disturbed the free circulation of people, goods and services within the area of the Common Market of the South. Uruguay “further alleged that the effect on the free circulation of people was in contravention of international commitments in the field of international human rights law”,⁹²³ cited the ECJ decision in *Commission v. France*⁹²⁴ and requested the MERCOSUR *Ad Hoc* arbitral tribunal to approach the dispute with Argentina in a corresponding way.

Argentina’s response referred to the five-hour protest ‘*el Abrazo Solidario*’ (‘the hug of solidarity’, in English) which happened in April 2005. This protest did not take place on a bridge, but on “the opposite bank to the Uruguayan city where the pulp mills were to be constructed”.⁹²⁵ It had gathered 40,000 people and, according to Argentina, gave rise to the protests on the bridges.

As a response, Uruguay claimed that harm was caused to its economy by the blockages. Argentina declared, however, that “the blockages were announced

⁹²² *Ibid.*, p. 357. The author makes express reference to paragraph 19 of the Bridges case, namely *Laudo del Tribunal Arbitral ‘Ad Hoc’ del Mercosur Constituido para Entender de la Controversia Presentada por la República Oriental del Uruguay a la República Argentina sobre ‘Omisión del Estado Argentino en Adoptar Medidas Apropriadadas para Prevenir y/o Hacer Cesar los Impedimentos a la Libre Circulación Derivados de los Cortes en Territorio Argentino de Vías e Acceso a los Puentes Gral. San Martín y Gral. Artigas que Unen la República Argentina con la República Oriental del Uruguay’* (‘Award of the Ad Hoc arbitral tribunal constituted to entertain the dispute presented by the Eastern Republic of Uruguay against the Argentinean Republic on the omission of the Argentinean State to adopt appropriate measures to prevent and/or stop the impediments to free movement arising from the blockages on Argentinean territory of the means of access to the international bridges General San Martín and General Artigas that unite the Argentinean Republic and the Eastern Republic of Uruguay’, in English). Award of 6th September 2006.

⁹²³ *Ibid.*, p. 357. The author makes express reference to paragraph 27 of the *Bridges Case*.

⁹²⁴ Case C-265/95, *Commission v. France* (judgement of the ECJ of 9th December 1997), is about several protests by discontent farmers in France concerning competition with farmers of other EU Member States, but especially Spain, Italy and Belgium. The European Commission became concerned about those protests, as it considered them hindrances to the fundamental economic freedom of free circulation of goods, and decided to enter into communications with France. Given that these communications did not bring any result, it brought an action against the French Republic before the ECJ.

⁹²⁵ Lixinski, 2010, p. 358, quoting paragraph 40 of the *Bridges Case*.

beforehand”⁹²⁶ and “drivers therefore had the possibility of planning alternative routes accordingly”.⁹²⁷ Furthermore, “Argentinean customs authorities had put in place an emergency scheme of operation so as to guarantee the normal flow of international trade, increasing the personnel in alternative access routes into the country”.⁹²⁸ Argentina also argued that demonstrations were allowed because of the freedoms of expression and assembly, which are protected by the Argentinean Constitution and also international instruments. It furthermore made express reference to the *Schmidberger* decision⁹²⁹ and interpreted it in the sense “that, in economic integration processes, respect for human rights norms can justify restricting rights enshrined in the integration treaty”.⁹³⁰ Lixinski explains, while citing *Gargarella*, that “[t]he practice of social protesting in Argentina is to provoke road blockages in order to draw public attention to a certain issue”.⁹³¹

The *Ad Hoc* arbitral tribunal decided that the actions performed by private parties in the case interfered with MERCOSUR’s free circulation of goods, which “could engage the responsibility of the State if the State did not act with due diligence”⁹³² by selecting the best means to accomplish the “goal of free circulation of goods”.⁹³³ Arbitrators dismissed the precedents of the ECJ that were invoked by both parties (i.e., Case C-265/95, *Commission v. France*, and Case C-112/00, *Schmidberger*, respectively) due to differences of fact of the cases brought before the ECJ compared

⁹²⁶ *Ibid.*

⁹²⁷ *Ibid.*, p. 358, quoting paragraph 42 of the *Bridges Case*.

⁹²⁸ Lixinski, 2010, p. 358, quoting paragraph 94 of the *Bridges Case*.

⁹²⁹ Case C-112/00, *Schmidberger* (preliminary ruling of the ECJ of 12th June 2003), is about an issue regarding environmental protection in the Brennen road area, in Austria, namely, environmental activists who wanted to organise a demonstration to raise awareness about the issue of air pollution on the mentioned road. The protesters requested and were granted an authorisation from the public authorities in order to organise their demonstration. Public authorities, among other measures to reduce the possible consequences of the demonstration on traffic in the area, gave an early warning about the demonstration taking place and organised an alternative route. What has been referred to the ECJ was whether or not the activities of the public authorities in permitting the demonstration to take place constituted an interference with the fundamental freedom of free circulation of goods. The ECJ concluded, after reviewing its fundamental rights case law, that fundamental rights – both those protected by the constitutional traditions of the Member States and those with special relevance through the provisions of the European Convention on Human Rights (ECHR) – could be deemed to be justifiable interferences with economic freedoms and, as a consequence, national authorities were unimpeded to conclude that the legitimate aim of those demonstrations could not be accomplished by means less restrictive of principles of the EC.

⁹³⁰ Lixinski, 2010, p. 358, quoting paragraph 51 of the *Bridges Case*.

⁹³¹ *Ibid.*, p. 362, quoting Gargarella, Roberto, *A Dialogue on Law and Social Protest*, in: Sajó, András (Ed.), *Free to Protest: Constituent Power and Street Demonstration*, Utrecht, Eleven International Publishing, 2009, p. 61.

⁹³² *Ibid.*, p. 358, quoting paragraph 116 of the *Bridges Case*.

⁹³³ *Ibid.*, p. 358, quoting paragraph 119 of the *Bridges Case*.

to the *Bridges Case* in the MERCOSUR as well as the diverse legal structures of the European Union and the MERCOSUR. With regard to the allegation by one of the parties (i.e., Argentina) that the *Ad Hoc* arbitral tribunal was not competent to entertain a claim on human rights, it firstly said that “human rights form the core of any legal order, and thus constituted an important element of the arbitration court’s considerations in the case”.⁹³⁴ *Lixinski* clarifies, however, that:

“Argentina based its argument on the hierarchy of human rights norms in its municipal law (which puts international human rights on the same level as the Constitution)”.⁹³⁵

But arbitrators dismissed this notion. According to them, a State cannot justify noncompliance with its international obligations by invoking its national law.⁹³⁶ The arbitral tribunal also explicitly referred to Art. 27 of the Vienna Convention on the Law of Treaties of 1969:

Article 27

Internal law and observance of treaties

A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. This rule is without prejudice to article 46.

And below is the text of Art. 46 of the same convention, which is mentioned in Art. 27:

Article 46

Provisions of internal law regarding competence to conclude treaties

1. A State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent

⁹³⁴ *Ibid*, p. 359-360, quoting paragraph 125 of the *Bridges Case*.

⁹³⁵ *Ibid*, p. 360, quoting paragraph 127 of the *Bridges Case*.

⁹³⁶ If more autonomy for Mercosur law is wanted, it can be argued that it is a wise strategy for *Ad Hoc* arbitral tribunals and the Permanent Court of Review to distance themselves from the domestic law of the Mercosur Member States.

unless that violation was manifest and concerned a rule of its internal law of fundamental importance.

2. A violation is manifest if it would be objectively evident to any State conducting itself in the matter in accordance with normal practice and in good faith.

With regard to the clash between human rights and fundamental economic freedoms that Argentina claimed to be protecting, the *Ad Hoc* arbitral tribunal held that a balancing of the conflicting interests was necessary in order to “guarantee that one interest would not be nullified by another”.⁹³⁷ On the other hand, arbitrators also stated that the right to protest can be limited by an economic freedom, as it is not an absolute right,⁹³⁸ but on the same level of economic freedoms. Furthermore, a specific right to protest is allegedly not protected by international human rights instruments. The relationship between human rights and trade, however, continues to be a controversial matter with two main diverging theories: while one considers human rights and trade law as separate legal fields, the other considers trade law (including international trade law) as a means of promoting human rights. It seems to me, based on the several whys and wherefores already pointed out throughout this thesis, that the latter theory is the most appropriate for the wellbeing of the peoples of our planet. But, the relationship between human rights and trade depends primarily on positive law and its application rather than diverging theories. While it is true that trade law has not always promoted human rights and is not promoting the way it should, one should ask oneself why that is happening and what has to be changed in order to make human rights promotion one of the goals of national and international trade law.

The arbitral tribunal also touched on the reasonableness of the actions of the protesters. While on the one hand it considered legitimate the objective pursued by the protesters, on the other hand it stated that “the protesters lost their legitimacy as time progressed, and they resorted to means more intrusive on the rights of others”.⁹³⁹

⁹³⁷ *Ibid*, p. 360, quoting paragraph 133 of the *Bridges Case*.

⁹³⁸ *Ibid*, p. 361, quoting paragraphs 138 and 139 of the *Bridges Case*.

⁹³⁹ *Ibid*, p. 361, quoting paragraph 158 of the *Bridges Case*.

It is also worth mentioning that the series of protests were also directly linked to the ‘*Abrazo Solidario*’, which was the first protest and did not take place on a bridge, but on the opposite bank to the Uruguayan city where pulp mills were to be constructed. While activists were mostly concerned about the harmful environmental effects of the plants, the Argentinean government was especially dissatisfied about the violation of an agreement between Argentina and Uruguay on the administration and general uses of the Uruguay River that was signed in 1975 (i.e., the statute of the Rio Uruguay). The violation of this agreement also gave rise to a case before the ICJ.⁹⁴⁰ As *Lixinski*⁹⁴¹ suggests, it can be implied that, at Argentinean governmental level, the real reason for the controversy was not the potential harm of the pulp mills to the environment, as Argentina also has several pulp mills in its national territory, but rather because Argentina was not willing to share with Uruguay the environmental costs of industrial plants that would bring economic benefits only to the latter.

The decision of the *Ad Hoc* arbitral tribunal created a compromise between Argentina and Uruguay rather than a winner and a loser party in the dispute. Both parties were supposedly satisfied with the sentence.⁹⁴² It was also more political than legal in order to calm the relations between the two countries. Furthermore, some consider the award to be partly vague.⁹⁴³ From a human rights perspective, however, the outcome may be considered a legal progress. This is because the arbitrators performed a balancing of human rights and MERCOSUR fundamental economic freedoms in their decision. To sum up, it can be understood that they decided “the exercise of a human right can be considered as a justifiable interference with an economic freedom, as long as the exercise of the human right pursues a legitimate aim, and the gain from the human rights activity is proportional to the hampering of the economic freedom”.⁹⁴⁴ It is, as a result, a matter of balancing between the affected economic freedom, the measure taken by the State to minimise its hampering, and the exercise of human rights – i.e., the freedoms of expression and assembly – through social protests.

⁹⁴⁰ *Pulp Mills on the River Uruguay*, Argentina v. Uruguay, ICJ, 4th May 2006.

⁹⁴¹ *Lixinski*, 2010, p. 361 f.

⁹⁴² *Ibid.*, p. 363.

⁹⁴³ Appleton, Arthur E./Graf, Bernd U., *Freedom of Speech and Assembly versus Trade and Transit Rights: Roadblocks to EU and MERCOSUR Integration*, in: *Legal Issues of Economic Integration*, Vol. 34, Nr. 3, The Hague, Kluwer Law International, 2007.

⁹⁴⁴ *Lixinski*, 2010, p. 363.

a. Final Remarks

The particularities of the decision recall, in my view, mediation and private settlement in Brazilian law⁹⁴⁵ rather than MERCOSUR arbitration. This is because, firstly, parties seem to have discussed and found a peaceful resolution to their conflicts, namely by following their own interests and, thus, establishing a just and fair order. And, secondly, parties seem to have simply formalised and ratified their resolution before the MERCOSUR *Ad Hoc* arbitral tribunal. Of course, arbitrators had to decide – i.e., namely approve it or not – and also give reasons for their decision.

With reference to access to justice, I would like to point to what I have argued in the subsection ‘Market Freedom’ of Chapter II, namely that human rights and trade are not in opposition, yet their relation depends on checks and balances in order to build and maintain harmony. Therefore, although the award of the *Ad Hoc* arbitral tribunal might be considered more political than legal and resemble Brazilian mediation and private settlement, human rights were taken into account and the decision leaves no doubt that human rights are to be safeguarded in the implementation of market rules. Furthermore, it has been surprising that arbitrators affirmed that human rights form the core of any legal order, and thus constituted an important element of the arbitration court’s considerations in the case.⁹⁴⁶ Thus, it can be implied that the award passed on 7th September 2006 enabled access to justice, although arbitrators dismissed in their judgement the precedents of the ECJ that were invoked by both parties (i.e., Case C-265/95, *Commission v. France*, and Case C-112/00, *Schmidberger*, respectively), as they considered the facts of the cases brought before the ECJ and the legal structure of the European Union to be different from the facts of the *Bridges Case* and the legal structure of the MERCOSUR. In contrast, some months later, on 3rd April 2007, the *Tribunal Permanente de Revisión* explicitly applied EU law and

⁹⁴⁵ According to *Diniz*, Brazilian private settlement can be defined as a bilateral legal transaction by which interested parties, by making mutual concessions, prevent or extinguish obligations that are doubtful or in dispute (*Diniz*, 2002, p. 499 quoted in *Paroski*, p. 317). For more details, please see the section ‘Alternative Dispute Settlement Procedures (Non-State-Owned)’ in the chapter about Brazil in this thesis.

⁹⁴⁶ *Lixinski*, 2010, p. 359-360, quoting paragraph 125 of the *Bridges Case*.

ECJ precedents in its first *Opinión Consultiva*⁹⁴⁷ with the *Costa v. ENEL* case law as well as the *Dassonville* and *Cassis de Dijon* formulas.

11. Access to Justice in the MERCOSUR

The purpose of this section is to examine the issue of access to justice in the MERCOSUR. The investigation will be carried out from constitutional and civil procedural perspectives. It is worth emphasising at this point that, since both substantive law and procedural law among the MERCOSUR Member States are different, a series of formal differences have to be harmonised. In fact, according to Art. 1 of the Treaty of Asunción, Member States committed themselves to harmonising their legislations in the fields of trade, agriculture, industry, taxes, money, capital market, services, customs, transport, and communications in order to ensure competitive conditions between them. And one may also conclude that, since all MERCOSUR Member States consider themselves democracies, the bloc has to become more democratic and respect access to justice, as this right is an essential element of democracy.

*Jaeger Junior*⁹⁴⁸ explains that it is believed that the Treaty of Asunción focused only on the economic field due to difficulties in advancing in the social area. These difficulties had the potential of never allowing the reaching of an agreement.

By taking into consideration the definition of access to justice that has been presented in Chapter I of this thesis, it becomes clear that the MERCOSUR currently does not (although it should) guarantee the right of access to justice to its private persons, namely natural persons that are residents of any of its member countries and legal persons with their headquarters or branches located in Argentina, Brazil, Paraguay, Uruguay or Venezuela. Additionally, while private persons do not have standing to file an action against someone and to appoint an attorney, the analysis of claims that are subject to an *Ad Hoc* arbitral tribunal or an Advisory Opinion are not independent

⁹⁴⁷ The first *Opinión Consultiva* of the Mercosur is examined in this thesis and can be found in the subsection named 'The first *Opinión Consultiva*' of chapter IV.

⁹⁴⁸ Jaeger Junior, Augusto, *Temas de Direito da Integração e Comunitário*, São Paulo, Editora LTr, 2002, p. 39.

of political and economic interests of the governments of the Member States, because the first body in charge of analysing the claim belongs to the Member State of the private persons themselves, i.e. the national section of the Common Market Group. Accordingly, the Member State of a private person has the authority to refuse to authorise the prosecution of the claim.⁹⁴⁹

The Protocol of Olivos and its regulations govern the entire dispute settlement mechanism of the MERCOSUR, from the question of admissibility of the parties to *Ad Hoc* arbitral tribunals and the TPR to the substantive law and formal content of the claim as well as the enforcement of legal decisions. The entire dispute settlement mechanism of the bloc may only be used by its Member States. This is because the system of disputes follows classic public international law. That being the case, every Member State that has obtained an award in its own favour has the faculty of self-enforcing, at its own discretion, against the losing Member State that does not comply in whole or in part with the award issued, as explicitly defined in the Protocol of Olivos.⁹⁵⁰ The benefited State may also apply temporary compensatory measures such as the suspension of concessions or other similar obligations. Following the principle of proportionality, such compensatory measures should be executed in the same trade sector or sectors affected by the obligated country. If, for some reason, suspensions in the same sector are considered to be ineffective or not practicable, the winning country may suspend concessions or obligations in another sector, but must provide the reasons for its decision.

The following subsection examines the specific situation of private parties.

⁹⁴⁹ The next subsection of this thesis analyses this and other problems.

⁹⁵⁰ Art. 31 of the Protocol of Olivos:

1. If a State party to a dispute does not comply, in whole or in part, with an award issued by the Arbitration Court, the other party to the dispute may, at its discretion, within a one (1) year period starting on the day after the expiration of the term referred to in Article 29.1 and without prejudice of the application of the procedures established in Article 30, begin to apply temporary compensatory measures aimed at complying with the award, such as the interruption of concessions or other similar obligations.
2. The State Party that obtained the award in its favour shall, first, attempt to interrupt the concessions or similar obligations in the same sector or sectors affected.

When suspensions in the same sector are considered impracticable or ineffective, the winning State may interrupt concessions or obligations in another sector, but shall provide the reasons of its decision.

3. The compensatory measures to be taken shall be communicated formally, by the State Party that will apply them to the State Party that has to comply with the award, at least fifteen (15) days prior to enforcement.

11.1. Private Persons

Access to justice is an essential human right that, as explained in Chapter I, constitutes the right of persons to access courts of law, have their cases heard in balanced proceedings, which guarantee a legal defence, adversarial systems and lawfully appointed judges, and are adjudicated in accordance with substantive standards of fairness and justice.⁹⁵¹ At MERCOSUR level, in the event that a legal or administrative measure linked to the MERCOSUR directly or indirectly affects private persons' rights, private persons have two options: (1) to file a claim before the national section of the Common Market Group of their Member State, which is going to consider the admissibility of the claim and whether or not to refer it to the MERCOSUR bodies,⁹⁵² or (2) file a claim before a national court, as explained in the section 'Addressees of MERCOSUR Law'.

The national section of the Common Market Group works as a 'filter' and hinders private parties from accessing the competent MERCOSUR bodies. In the case of Brazil, since the national section of the Common Market Group is an administrative body of the national government, petitions do not have any judicial status.⁹⁵³ On the other hand, in the event that Brazil's national section of the Common Market Group considers the petition to be without any grounds, private parties may still file an appeal known as '*recurso administrativo*' ('administrative appeal' or 'administrative remedy', in the English translation) within 10 days.⁹⁵⁴

⁹⁵¹ For more details on this definition, please refer to chapter 1.

⁹⁵² The National Section of the Common Market Group is made up of civil servants from the Ministry of Foreign Affairs and the national central bank. It is therefore an extension of a national organ of the Member State itself. This does not presuppose impartiality in reviewing complaints and implies a low probability for actions to prosper. It is highly unlikely that State employees are going to impartially analyse an action against the State for which they work.

⁹⁵³ Art. 5, XXXIV (a) of the Brazilian constitution: - *são a todos assegurados, independentemente do pagamento de taxas:*

o direito de petição aos Poderes Públicos em defesa de direitos ou contra ilegalidade ou abuso de poder;

⁹⁵⁴ Article 2, sole paragraph, section X in conjunction with Art. 56, paragraphs 1 and 2, Art. 57, Art. 58 and Art. 59, paragraphs 1 and 2 of law Nr. 9,784 of 1999, which is about the administrative proceeding in the federal public administration sphere:

Art. 2º A Administração Pública obedecerá, dentre outros, aos princípios da legalidade, finalidade, motivação, razoabilidade, proporcionalidade, moralidade, ampla defesa, contraditório, segurança jurídica, interesse público e eficiência.

Parágrafo único. Nos processos administrativos serão observados, entre outros, os critérios de:
(...)

It is, however, currently technically impossible for private persons to file a claim against their own countries through the MERCOSUR dispute settlement mechanism. Even if a specific Member State does not comply with a MERCOSUR legal obligation and is prejudicing private persons, claims have to be submitted in the first instance to the national section of the Common Market Group. This procedure applies even for claims against the country in which the national section is located. It, therefore, becomes impossible for a Member State to bring an action against itself. Thus, it can be concluded that there is an omission in the norms of the MERCOSUR with regard to the ability of private persons to bring an action against their own country. In other words, there is a flagrant violation of the right of access to justice, which, although it is not foreseen in MERCOSUR law itself, has the status of a fundamental right at the national level of all MERCOSUR Member States and the status of a human right at the global level, making countries become ‘double bound’ to it. The national judiciary, as a result, is the most appropriate alternative option for a similar kind of claim (i.e., private persons against their own countries), as national judges do not, in principle, analyse the political aspects involved in claims and, additionally, their decisions have national judicial character – i.e., their decisions do not require any participation of the legislative or executive powers in order to become nationally enforceable. In the case of Brazil, it is appropriate to remember the text of

X - garantia dos direitos à comunicação, à apresentação de alegações finais, à produção de provas e à interposição de recursos, nos processos de que possam resultar sanções e nas situações de litígio;

Art. 56. Das decisões administrativas cabe recurso, em face de razões de legalidade e de mérito.

§ 1º O recurso será dirigido à autoridade que proferiu a decisão, a qual, se não a reconsiderar no prazo de cinco dias, o encaminhará à autoridade superior.

§ 2º Salvo exigência legal, a interposição de recurso administrativo independe de caução.

Art. 57. O recurso administrativo tramitará no máximo por três instâncias administrativas, salvo disposição legal diversa.

Art. 58. Têm legitimidade para interpor recurso administrativo:

I - os titulares de direitos e interesses que forem parte no processo;

II - aqueles cujos direitos ou interesses forem indiretamente afetados pela decisão recorrida;

III - as organizações e associações representativas, no tocante a direitos e interesses coletivos;

IV - os cidadãos ou associações, quanto a direitos ou interesses difusos.

Art. 59. Salvo disposição legal específica, é de dez dias o prazo para interposição de recurso administrativo, contado a partir da ciência ou divulgação oficial da decisão recorrida.

§ 1º Quando a lei não fixar prazo diferente, o recurso administrativo deverá ser decidido no prazo máximo de trinta dias, a partir do recebimento dos autos pelo órgão competente.

§ 2º O prazo mencionado no parágrafo anterior poderá ser prorrogado por igual período, ante justificativa explícita.

the sole paragraph of Art. 4 of the Brazilian Constitution which is about an integration of the peoples of Latin America,⁹⁵⁵ namely

“The international relations of the Federative Republic of Brazil are governed by the following principles:

(...)

Sole Paragraph. The Federative Republic of Brazil shall seek the economic, political, social and cultural integration of the peoples of Latin America, viewing the formation of a Latin-American community of nations.”⁹⁵⁶

Furthermore, since the constitutions of the remaining MERCOSUR Member States also support the integration of the peoples of Latin America, national judges of all Member States of the bloc play a fundamental role in the protection of private persons. That being the case, if the number of legal issues relating to private persons in MERCOSUR law increases, the role of national judges will also become even more important and crucial in promoting access to justice on MERCOSUR law issues as well as ‘regular’ domestic law issues.

While in the European Union national judges are considered to be the first judges of EU law, national judges of the MERCOSUR Member States are not the first representatives of the bloc’s law, but are considered, as a rule, as simple ‘*aplicadores*’ (‘enforcers’, in English) of norms that have already been domestically implemented. Contrary to several authors, I believe that national judges of MERCOSUR Member States should also interpret and apply MERCOSUR norms that have not yet been implemented, for the reason that these norms are already in force at the international level between the Member States and, as a result, represent the will of national

⁹⁵⁵ For further details, please see the section of this thesis named ‘Mercosur Law and Brazilian Constitutional Law’.

⁹⁵⁶ Art. 4º. *A República Federativa do Brasil rege-se nas suas relações internacionais pelos seguintes princípios:*

(...)

Parágrafo único. A República Federativa do Brasil buscará a integração econômica, política, social e cultural dos povos da América Latina, visando à formação de uma comunidade latino-americana de nações.

governments. Furthermore, according to Articles 18 and 26 of the VCLT of 1969,⁹⁵⁷⁻
⁹⁵⁸ any international treaty must be implemented in *bona fides*, so that States are obliged to abstain themselves from performing any act that undermines the rationale and objective of the treaty, because its introduction into the national legal system is an *obligation de result* and not an *obligation de moyen*.⁹⁵⁹ Therefore, interpreting and applying non-implemented MERCOSUR norms is a very important further step in the protection of the right of private persons to have access to justice. Accordingly, national judges, in order to connect the international and national legal systems, provide a rule of law and achieve results that are similar to those of direct effect of international law,⁹⁶⁰ have to focus on consistent interpretation.

It might be too early to expect such conduct from national judges in Brazil, especially due to the position of the STF with regard to the cases CR 8,279/Arg and CR-AgrR 7,613.⁹⁶¹ The minimum that Brazilian judges must accept, however, are actions for damages against the Brazilian government due to any damage, loss, harm or injury caused by the non-implementation of MERCOSUR norms in Brazil.⁹⁶² Although compensations – e.g., compensations for pecuniary losses, non-pecuniary losses (personal injury, emotional distress and mental anguish, for example) and ‘*lucros*

⁹⁵⁷ Art. 18. A State is obliged to refrain from acts which would defeat the object and purpose of a treaty when:

(a) it has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty; or

(b) it has expressed its consent to be bound by the treaty, pending the entry into force of the treaty and provided that such entry into force is not unduly delayed.

⁹⁵⁸ Art. 26. Every treaty in force is binding upon the parties to it and must be performed by them in good faith.

⁹⁵⁹ Dinh, Nguyen Q./Daillier, Patrick/Pellet, Allain, *Direito Internacional Público*, Lisboa, Fundação Calouste Gulbenkian, 1999, p. 210.

⁹⁶⁰ For details, see Nollkaemper, André, *National Courts and the International Rule of Law*, Oxford, Oxford University Press, 2011, p. 141.

⁹⁶¹ As I have explained in the section named ‘Brazilian Constitutional Law and International Treaties’ of Chapter III on the the Brazilian dimension of access to justice, the STF has already referred to the reception of international instruments which Brazil entered into in the Mercosur and equated them to international treaties and conventions in general. While it acknowledged that a different incorporation for Mercosur acts is desirable, it affirmed that the current Brazilian constitutional system does not enshrine the principles of direct effect or immediate applicability of international treaties and conventions. It also stated that Mercosur norms that were not implemented in Brazil may neither be invoked by private parties nor applied domestically until all necessary steps for their entering into force have not been performed. For more details, see case CR 8,279/Arg at the official website of the STF.

⁹⁶² Bilateral investment agreements and investment provisions within NAFTA, for instance, “confer rights on investors to sue governments for damages where they violate investor entitlements under these treaties”. For details see, Howse, Robert, *Sovereignty, Lost and Found*, In: Shan, Wenhua/Simons, Penelope/Singh, Dalvinder, *Redefining Sovereignty in International Economic Law*, Oxford and Portland, Oregon, Hart Publishing, 2008, p. 72 f.

cessantes' (the profits that a person did not have within the period of time in which it could not execute a specific business activity) – do not allow access to justice, they may serve to compensate private persons for their losses. In my view, compensations do not always allow access to justice because they are a kind of reimbursement for losses or injuries. Accordingly, compensations cannot always provide what has been lost (i.e., the object itself), are not always able of making a person healthy again (e.g., in cases of a serious accident or an illness), do not always correct a harm, etc., as there are too many different sorts of damages. Nevertheless, due to the potential costs involved for the Brazilian government, such compensations may contribute to making the national legislative and executive powers change their attitudes towards the implementation of MERCOSUR norms. Changing attitudes will, as a result, lead to two improvements: developing access to justice on MERCOSUR law issues and reducing expenses for the public treasury.

Another area of concern is the lack of knowledge of the population and law professionals about what the MERCOSUR really is. It is regrettable that attorneys, judges and State prosecutors do not know the rights and obligations created by the Common Market of the South. The same lack of knowledge also applies to other international norms and the question of which of them have been domestically implemented. Therefore, law professionals also have to be trained and properly professionalised.

*Jaeger Junior*⁹⁶³ explains the critical situation of 'border workers' and defines them as marginalised. He stresses that the Asunción Treaty is silent about labour law and quality of life, even though economic integration depends on the free movement of persons without being subject to the controls of internal borders in order to work, invest and reside, since any integration is done by people, is for people and is based on people. The same author argues that this sort of marginalisation of citizens of the Member States does not allow them to know what is happening, does not give them the opportunity to form their own opinions and does not enable them to generate debates.⁹⁶⁴ Unfortunately, there is also no legislation that is specific to the transit of

⁹⁶³ Jaeger Junior, Augusto, *Temas de Direito da Integração e Comunitário*, São Paulo, Editora LTr, 2002, p. 39.

⁹⁶⁴ *Ibid.*, p. 40.

persons, automobiles and freight vehicles across the borders of MERCOSUR countries. I agree with *Jaeger Junior* that citizens need to understand and see the project, have a tangible image of the work through, for instance, bridges, roads, schools and power plants, because, although these constructions do not represent the entire integration, they allow citizens to better see the MERCOSUR, create some sympathy for it and also form a MERCOSUR identity.⁹⁶⁵ The same author argues that there is a social dumping in the MERCOSUR, which contradicts the preamble of the Treaty of Asunción.⁹⁶⁶

It can be added that divergences with regard to the interpretation and application of norms will continue to exist as long as the national judiciary powers of the MERCOSUR Member States are not familiarised with the law of integration of the bloc. Still, the TPR represents a great improvement in the present dispute settlement mechanism, as it has the potential of creating more legal certainty and less non-uniform interpretations. An effective way for the national judiciaries to start becoming more mindful about Mercosur law is requesting advisory opinions more frequently.⁹⁶⁷

11.2. Cooperation Protocols and Conventions

Some cooperation protocols and conventions have been designed to help private persons to protect their rights within the scope of the national judicial power. Although these instruments do not refer to access to justice at Mercosur level, they represent the beginning of a new judicial cooperation among the Mercosur Member States. This new cooperation is additional to the pre-existing economic and trade cooperation and is definitely useful for improving the free movement of persons, goods and services in the area of the bloc, and, as a consequence, contributing to create a true common market. The 7 most important instruments are:

1. Protocol of Buenos on International Jurisdiction over Contractual Matters (Buenos Aires, 1994);

⁹⁶⁵ *Ibid.*, p. 41.

⁹⁶⁶ *Ibid.*, p. 42.

⁹⁶⁷ For details about the advisory opinions, please refer to the subsection of this chapter named 'Advisory Opinions'.

2. Inter-American Convention on Letters Rogatory (Montevideo, 1975);
3. Inter-American Convention on Proof of and Information on Foreign Law (Montevideo, 1979);
4. Additional Protocol to the Inter-American Convention on Letters Rogatory (Montevideo, 1979);
5. Protocol on Precautionary Measures of the CMC (Ouro Preto, 1994);
6. Inter-American Convention on the Extraterritorial Efficacy of Foreign Judgements and Arbitration Awards (Montevideo, 1979);
7. Protocol of Las Leñas on Judicial Cooperation and Assistance in Civil, Commercial, Labour and Administrative Matters (Las Leñas, 1992).

With regard to the right of access to justice, the Protocol of Las Leñas needs to be highlighted, because it was created to ensure that ‘MERCOSUR citizens’⁹⁶⁸ that are permanent residents of any MERCOSUR Member State have access to courts of all countries of the bloc regardless of their MERCOSUR country of citizenship and MERCOSUR country of residence. This protocol also intends to create an egalitarian right of legal defence (i.e., in compliance with the principle of equal treatment), to increase legal certainty and improve the legal protection of the citizens of the MERCOSUR Member States. Art. 19 of the protocol provides that the request for recognition and enforcement of judicial decisions and arbitral awards by the judicial authorities shall be carried out by means of letters rogatory through the Central Authority. In Brazil, the ratification of a foreign judgement of a MERCOSUR country has a facilitated procedure, which does not, nevertheless, elide a specific procedure before the Brazilian *Superior Tribunal de Justiça* (it is important to note that constitutional amendment Nr. 45 of the year 2004 transferred the jurisdiction concerning procedures of ratification of foreign judgements from the *Supremo Tribunal Federal* to the *Superior Tribunal de Justiça*)⁹⁶⁹. A judgement delivered by the *Supremo Tribunal Federal* in 1997 confirms that. The most important part of the judgment defines that:

⁹⁶⁸ Nowadays citizens are no longer tied to their Nation States. There are different approaches to citizenship and, depending on the approach, new values can be developed. In the Mercosur, for instance, the passports of its Member States contain in their covers the name ‘Mercosur’ (‘Mercosul’ in the case of Brazil) above the name of the countries, exactly in the same place in which the name ‘European Union’ (i.e., ‘Europäische Union’ in the case of Germany and Austria, ‘Unión Europea’ in the case of Spain and so on) is found in passports of EU Member States.

⁹⁶⁹ The *Superior Tribunal de Justiça* is Brazil’s highest judicial instance for non-constitutional matters.

“The Protocol of Las Leñas (‘Protocol on Judicial Cooperation and Jurisdictional Assistance in Civil, Commercial, Labour and Administrative Matters’ between the MERCOSUR countries) has not affected the requirement that any foreign judgment – which is to be equated to an interlocutory decision concessive of a protective measure – to become enforceable in Brazil must be previously submitted to homologation of the Federal Supreme Court, being prevented the admission of its incident recognition in the Brazilian judiciary by the court at which the enforcement is requested; this protocol innovated, nevertheless, by providing in Art. 19 that homologations (called recognitions) of judgments drawn up in Member States be performed by rogatory letters. This means admitting the initiative of the competent judicial authority of the judiciary of the country of origin and that the order of enforcement is to be granted regardless of the notification of the defendant, without prejudice to the subsequent manifestation of the defendant, through an appeal from the concessive decision or through objections to compliance.”⁹⁷⁰

Given that two corollaries of access to justice in Brazil are free legal aid and costless access to courts (i.e., free judicial aid, known also as ‘*in forma pauperis*’),⁹⁷¹ both to be provided by the State to those parties who have been evaluated and considered

⁹⁷⁰ The text in its original language:

“O Protocolo de Las Leñas (“Protocolo de Cooperação e Assistência Jurisdicional em Matéria Civil, Comercial, Trabalhista, Administrativa” entre os países do Mercosul) não afetou a exigência de que qualquer sentença estrangeira – à qual é de equiparar-se a decisão interlocutória concessiva de medida cautelar – para tornar-se exequível no Brasil, há de ser previamente submetida à homologação do Supremo Tribunal Federal, o que obsta a admissão de seu reconhecimento incidente, no foro brasileiro, pelo juízo a que se requeira a execução; inovou, entretanto, a convenção internacional referida, ao prescrever, no art. 19, que a homologação (dita reconhecimento) de sentença provida dos Estados partes se faça mediante rogatória, o que importa admitir a iniciativa da autoridade judiciária competente do foro de origem e que o exequatur se defira independentemente da citação do requerido, sem prejuízo da posterior manifestação do requerido, por meio de agravo à decisão concessiva ou de embargos ao seu cumprimento (CR-AgR 7,613 / AT – Argentina Ag.Reg. na Carta Rogatória. Relator(a): Min. Sepúlveda Pertence. Julgamento: 03/04/1997. Órgão Julgador: Tribunal Pleno).”

⁹⁷¹ Art. 5, LXXIV of the Brazilian Constitution uses the expression ‘o Estado prestará assistência jurídica integral e gratuita’ (i.e., ‘the State shall provide full and free-of-charge legal assistance’). This expression reflects the sum of free legal aid and free judicial aid. Accordingly, the State assumes the obligation to pay not only the procedural costs but also the fees of the attorney who is working for the party who receives full and free-of-charge legal assistance.

disadvantaged,⁹⁷²⁻⁹⁷³ it is worth mentioning Decision CMC/DEC Nr. 49/00 of the Common Market Council. This decision, which is regulated in Brazil by Decree Nr. 8,086 of 19th April 2007, is about the benefit of free legal and judicial aid for citizens and residents of MERCOSUR Member States. Its aim is to provide to citizens and habitual residents of each of the Member States, irrespective of the Member State of which they are residents, with uniform benefits of free legal and judicial aid – i.e., on equal terms and without discrimination or disadvantage on grounds of citizenship or residence.

Also the Protocol of Santa Maria on International Jurisdiction Regarding Consumer Relations of 1996⁹⁷⁴ has to be mentioned. It extends the scope of the right of access to justice in consumer relations (i.e., consumer transactions) so that a consumer or a supplier of goods and/or services may sue each other with regard to consumer relations. A consumer, as a consequence, can sue a supplier and execute the judgment in his own *forum domicilii* or in the *forum domicilii* of the supplier. The protocol enables citizens of the MERCOSUR Member States to get assistance from consumer protection agencies of any of the MERCOSUR countries and aims at the effective protection of consumers, especially tourists. According to the protocol, countries commit to inform and advise consumers about their rights, provide nimble mechanisms to solve conflicts related to consumer transactions – which nevertheless have to follow the rules and procedures of the national law of the host country –, establish mechanisms for the reciprocal exchange of information concerning complaints and jointly analyse the results of the protocol in force.

⁹⁷² “Art. 5º Todos são iguais perante a lei, sem distinção de qualquer natureza, garantindo-se aos brasileiros e aos estrangeiros residentes no País a inviolabilidade do direito à vida, à liberdade, à igualdade, à segurança e à propriedade, nos termos seguintes:

(...)

LXXIV - o Estado prestará assistência jurídica integral e gratuita aos que comprovarem insuficiência de recursos;”

The text of Art. 5, LXXIV of the Brazilian Constitution can be translated to English as follows:

‘All persons are equal before the law, without any distinction whatsoever, Brazilians and foreigners residing in the country being ensured of inviolability of the right to life, to liberty, to equality, to security and to property, on the following terms:

(...)

LXXIV - the State shall provide full and free-of-charge legal assistance to all who prove insufficiency of funds;’

⁹⁷³ It is worth underlining that Art. 5 of the Brazilian Constitution is the most important article in terms of fundamental rights and guarantees.

⁹⁷⁴ CMC Decision Nr. 10/96.

In practice, however, these protocols and conventions are subject to some instability, since only in Argentina and Paraguay, which are monist Nation States, do they receive constitutional status. This fact complicates both the direct applicability and the effectiveness of protocols and conventions in Brazil and Uruguay, countries that are dualist and in which these instruments have infra-constitutional status. As has already been explained in this thesis, Venezuela is both monist and dualist, as it follows a mixed theory in the relationship between international and national law in that in some circumstances it is monist⁹⁷⁵ but in others it is dualist.⁹⁷⁶

11.3. The *Opinión Consultiva*

A uniform interpretation of the law has been sought since the negotiations that preceded the signing of the Protocol of Olivos. All the heads of State of the four MERCOSUR Member States considered uniform interpretation of the law a very important requirement for both legal predictability and legal dependability. The main problem, however, was finding the most appropriate method to achieve this common goal, as a uniform interpretation of the law of integration also depends on the adaptation of Member States' conducts – i.e., the conducts of representatives of

⁹⁷⁵ Here are the monist examples again: Art. 23 concerning human rights and part of Art. 153 with regard to integration agreements.

“Artículo 23. Los tratados, pactos y convenciones relativos a derechos humanos, suscritos y ratificados por Venezuela, tienen jerarquía constitucional y prevalecen en el orden interno, en la medida en que contengan normas sobre su goce y ejercicio más favorables a las establecidas por esta Constitución y en las leyes de la República, y son de aplicación inmediata y directa por los tribunales y demás órganos del Poder Público.”

“Artículo 153. (...) Las normas que se adopten en el marco de los acuerdos de integración serán consideradas parte integrante del ordenamiento legal vigente y de aplicación directa y preferente a la legislación interna.”

⁹⁷⁶ Here are the dualist examples again: articles 154, 217 and 236, section 4.

“Artículo 154. Los tratados celebrados por la República deben ser aprobados por la Asamblea Nacional antes de su ratificación por el Presidente o Presidenta de la República, a excepción de aquellos mediante los cuales se trate de ejecutar o perfeccionar obligaciones preexistentes de la República, aplicar principios expresamente reconocidos por ella, ejecutar actos ordinarios en las relaciones internacionales o ejercer facultades que la ley atribuya expresamente al Ejecutivo Nacional.”

“Artículo 217. La oportunidad en que deba ser promulgada la ley aprobatoria de un tratado, de un acuerdo o de un convenio internacional, quedará a la discreción del Ejecutivo Nacional, de acuerdo con los usos internacionales y la conveniencia de la República.”

“Artículo 236. Son atribuciones y obligaciones del Presidente o Presidenta de la República:

(...)

4. Dirigir las relaciones exteriores de la República y celebrar y ratificar los tratados, convenios o acuerdos internacionales.”

national societies, but especially law professionals and private persons involved in trade and services transactions.

Diverse interpretations among national courts as well as arbitrators of an alternative dispute settlement procedure, e.g. Brazilian arbitration,⁹⁷⁷ may continually jeopardise the MERCOSUR law of integration. Thus, it becomes possible that a specific MERCOSUR norm is interpreted and applied differently in the Member States. The same norm is even likely to be applied according to five different rules of interpretation, namely one at each of the Member States. The Protocol of Olivos, however, provides for an instrument that is available to national judges as an institutionalised guidance for interpreting MERCOSUR norms, namely a kind of preliminary ruling of the *Tribunal Permanente de Revisión* known as '*Opinión Consultiva*' ('advisory opinion', in English). An advisory opinion of the TPR may be called a 'guidance' because it is not binding upon the national judge who requested it. In other words, the national judge is free to disagree with the advisory opinion. On the other hand, the mere advisory nature of the *Opinión Consultiva* should not be considered by national judges as an artifice for the non-application of the TPR interpretation on the dispute, because, while the necessary reforms with reference to this matter are not executed, national judges are responsible for transforming advisory opinions into a cooperation mechanism between the TPR and national courts. With the expression 'cooperation mechanism' I mean that national judges are expected to cooperate with the TPR. Hence, national judges unquestionably have the possibility of incorporating the MERCOSUR law into the national judicial structure. Such incorporation is necessary not simply because of the legal consequences for the parties concerned in a particular case but also because of the significant wider implications in the country, especially national jurisprudence about MERCOSUR law.

The Protocol of Olivos seeks through its regulated advisory opinions to establish a uniform interpretation of MERCOSUR law in the bloc's economic area.⁹⁷⁸ *García*⁹⁷⁹ argues that the corner stone of a community is not simply its legislation but that its

⁹⁷⁷ For details, see section 'Alternative Dispute Settlement Procedures (Non-State-Owned)' in chapter 3.

⁹⁷⁸ Redrado, Martín, *Comunicado de prensa finalizada la Reunión del CMC*, 19 February 2002, which can be found at www.mercosur.int.

⁹⁷⁹ *García, Ricardo Alonso, Derecho comunitario: sistema constitucional y administrativo de la Comunidad Europea*, Madrid, 1994, p. 325.

legislation is applied in a common way by the courts of all its Member States, similarly to State courts in a federal republic, which are bound to interpret and apply federal laws in the same way. In the European Union, ECJ/CJEU decisions are binding and, consequently, build relationships of subordination.

The preamble of the Protocol of Olivos provides for the uniform interpretation of the law in the MERCOSUR. Chapter III establishes the possibility of setting up instruments to apply for *Opiniones Consultivas*⁹⁸⁰ at the TPR and also defines that the CMC is the competent body to define the scope and procedure of *Opiniones Consultivas*.⁹⁸¹

In conclusion, the advisory opinion of the MERCOSUR may be regarded as a legal tool of persuasion in favour of the MERCOSUR integration process. It has been inspired in the preliminary ruling of the European Union and represents the importance given by the MERCOSUR *vis-à-vis* uniform legal interpretation and legal application in an integration process. An *Opinión Consultiva* circumvents constitutional barriers and represents a further step to render possible uniform interpretations of MERCOSUR legislation at the national level, as the last judgement, namely the one to become nationally binding, is always delivered by a national court.

a. The procedural rules of the *Opinión Consultiva*

In the European Union, the Court of Justice of the European Union (CJEU) guarantees the appropriate interpretation and application of EU law. This is mainly executed in the context of two types of proceedings, namely procedures that are opened and decided at the CJEU and procedures for preliminary rulings. The latter are brought by national courts of the EU Member States. According to the former Art. 234 of the EC Treaty (i.e., Art. 267 TFEU), the European Court of Justice (called Court of Justice of the European Union since the Treaty of Lisbon) has jurisdiction to provide preliminary rulings on the interpretation of the EC/EU treaties, the validity and interpretation of acts of EU institutions, including the European Central Bank,

⁹⁸⁰ It is the plural of *Opinión Consultiva*.

⁹⁸¹ The preliminary ruling procedure of the Mercosur is provided for in Art. 3 of the Protocol of Olivos.

and the interpretation of by-laws of the European Council.⁹⁸² Thus, in proceedings under Art. 234 of the EC Treaty,⁹⁸³ ECJ decisions were primarily on the interpretation of EU law and the validity of acts of EU institutions. A preliminary ruling has, therefore, a dual function: to defend the unity of EU law and to assure legal protection of private parties.

The TFEU expanded the scope of preliminary rulings. According to its Art. 267, the CJEU may give preliminary rulings regarding the interpretation of treaties; the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union; if such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the CJEU to give a ruling thereon; if any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the CJEU; and, in cases pending before a court or tribunal of a Member State with regard to a person in custody, the Court of Justice of the European Union shall act with the minimum of delay.⁹⁸⁴

⁹⁸² “Article 234. The Court of Justice shall have jurisdiction to give preliminary rulings concerning:

- (a) the interpretation of this Treaty;
- (b) the validity and interpretation of acts of the institutions of the Community and of the ECB;
- (c) the interpretation of the statutes of bodies established by an act of the Council, where those statutes so provide.

Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court of Justice to give a ruling thereon.

Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court of Justice.”

⁹⁸³ In the TFEU, preliminary rulings are foreseen in Art. 267.

⁹⁸⁴ The text of the current Article 267 TFEU is as follows:

“The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning:

- (a) the interpretation of the Treaties;
 - (b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union;
- Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a ruling thereon.

Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court.

If such a question is raised in a case pending before a court or tribunal of a Member State with regard to a person in custody, the Court of Justice of the European Union shall act with the minimum of delay.”

In the Common Market of the South, on the other hand, requested *Opiniones Consultivas* may simply be about the interpretation of the Treaty of Asunción, the Protocol of Ouro Preto as well as the protocols and agreements signed within the framework of the Treaty of Asunción, the decisions of the CMC, the resolutions of the GMC and the directives of the CCM.⁹⁸⁵ In addition, *Opiniones Consultivas* may only be requested in judicial proceedings and proceedings in contentious administrative matters which are in course within the territory of the requesting Member State.⁹⁸⁶ It is absolutely necessary that the request for an *Opinión Consultiva* from the TPR is made through the national court of last instance – the *Supremo Tribunal Federal*, in the case of Brazil.⁹⁸⁷ The national court of last instance receives the requests from all courts of lower instances.

While the former EC Treaty had no regulations concerning the form and contents for a request for a preliminary ruling⁹⁸⁸ and the respective criteria emerged from legal practice and jurisprudence,⁹⁸⁹ each MERCOSUR Member State court of last instance shall, according to Council Decision Nr. 02/07, establish the domestic procedural rules for the request of *Opiniones Consultivas* in its respective country.⁹⁹⁰

The request for advisory opinions must be submitted in writing and contain the presentation of the facts, the subject matter and the legal grounds, which must precisely designate the MERCOSUR norms in question.⁹⁹¹ In the event that any documents are necessary to clarify the facts, defend the subject matter of the advisory opinion and the interests of the parties involved as well as the national public prosecutor's ones, these documents may be sent to the TPR together with the request for an advisory opinion. Furthermore, the TPR can request explanations and

⁹⁸⁵ Cf. Art. 4 (2) of Council Decision Nr. 02/07.

⁹⁸⁶ Cf. Art. 4 (3) of Council Decision Nr. 02/07.

⁹⁸⁷ According to Art. 2 of Council Decision Nr. 02/07, the courts are the *Corte Suprema de Justicia de La Nación* in Argentina, the *Supremo Tribunal Federal* in Brazil, the *Corte Suprema de Justicia* in Paraguay and the *Suprema Corte de Justicia y Tribunal de lo Contencioso Administrativo* in Uruguay. For more details, see Art. 3 of the Council Decision.

⁹⁸⁸ ECJ Case 13/61, *De Geus/Bosch*, Collection 1962, 97, p. 110.

⁹⁸⁹ Groeben, Hans von der (Ed.), 2004, p. 538.

⁹⁹⁰ Cf. Art. 1 paragraph 1 of Council Decision Nr. 02/07.

⁹⁹¹ Cf. Art. 4 sections (a), (b) and (c) of Council Decision Nr. 02/07.

documents from the national court of last instance in order to clarify more aspects that are necessary to be considered for an *Opinión Consultiva*.⁹⁹²

The acceptance or rejection of a request for an advisory opinion is informed by the TPR to the national court of last instance. The same is done with the advisory opinion itself – i.e., once it is enacted by the TPR, it is sent to the national court of last instance. Moreover, the national courts of last instance of the remaining MERCOSUR Member States plus the MERCOSUR Secretariat are also notified about the newly enacted advisory opinion.⁹⁹³ This is positive to build legal understandings on MERCOSUR law at national level.

An advisory opinion of the *Tribunal Permanente de Revisión* – as already mentioned in other parts of this thesis – has no binding effect and is, consequently, unlike an ECJ/CJEU preliminary ruling, which is always binding on national courts. As a result, the award of a MERCOSUR Member State national court (independently of its instance) may be different from the advisory opinion. On the other hand, the preventive character of the MERCOSUR advisory opinion and its undefined scope can contribute for the establishment of compliance.

b. The first *Opinión Consultiva*

The first advisory opinion of the TPR concerns chiefly international procedural law, namely the Protocol of Buenos Aires on international jurisdiction for claims involving debt contracts.⁹⁹⁴ This protocol was signed in 1995 and came into force among Argentina, Brazil, and Paraguay in 1997, but was disregarded in practice.⁹⁹⁵ Only since July 2004, after Uruguay also ratified the protocol, it is applicable among all MERCOSUR Member States.⁹⁹⁶

⁹⁹² Cf. Art. 8 of Council Decision Nr. 37/03.

⁹⁹³ Cf. Art. 10 of Council Decision Nr. 02/07.

⁹⁹⁴ Samtleben, Jürgen, *Ein Gerichtsstandsübereinkommen für den Südamerikanischen Gemeinsamen Markt (MERCOSUR)*, IPRax 1995, p. 129 ff.

⁹⁹⁵ Cf. Samtleben, Jürgen, *Die Entwicklung des Internationalen Privat- und Prozessrechts im MERCOSUR*, IPRax 2005, p. 376 and 379 f.

⁹⁹⁶ Ratification of Uruguay on 29th July 2004, sanctioning act Nr. 17,721 of 24th December 2003 (Official Gazette of 7th January 2004).

An action before a court of Asunción, Paraguay, between a Paraguayan and an Argentinean company was the starting point. The company *Norte S.A. Importación-Exportación* and the company *Laboratorios Northia S.A.C.I.F.I.A.* concluded a contract in May 2000 in Buenos Aires, Argentina, to trade Argentinean goods in Paraguay. The contract contained a choice of law clause in favour of Argentinean law and provided for the exclusive jurisdiction of the courts of the city of Buenos Aires with explicit reference to the MERCOSUR law of integration and, in particular, the Protocol of Buenos Aires.

The Protocol of Buenos Aires declares in Art. 4 that agreements on international jurisdiction are admissible.

But, the Paraguayan company sued the Argentinean company before a court of Asunción with an action for damages and profit loss. The legal basis was Paraguayan law Nr. 194 of the year 1993, which provides in its Art. 10 for the overriding Paraguayan jurisdiction concerning agreements involving foreign companies and national sales representatives or distributors. The claimant also requested a preliminary order for precautionary measures.

The '*Tribunal de Apelación*' ('court of appeals', in English), however, sentenced that the Protocol of Buenos Aires prevails over the Paraguayan law⁹⁹⁷ and, as a result, cancelled the preliminary order granted by the court of first instance due to the lack of competence of Paraguayan courts in the case.⁹⁹⁸

The claimant, in contrast, sustained in the main proceedings that the contract concluded between the parties was not within the scope of the Protocol of Buenos Aires. Instead, the claimant advocated that the contract should be subject to the Protocol of Santa Maria on the international jurisdiction for claims involving consumer relations, which was not in force yet. In addition, the claimant also argued that the *Tribunal Permanente de Revisión* should deliver an *Opinión Consultiva*. This

⁹⁹⁷ Art. 137 of the Paraguayan Constitution.

⁹⁹⁸ Samtleben, Jürgen, *Gerichtsstandsklauseln im MERCOSUR – Erstes Vorlageverfahren vor dem MERCOSUR-Gericht*, in: *Praxis des Internationalen Privat- und Verfahrensrechts (IPRax)*, Vol. 28, 2008, Book 1, p. 53.

was also the view of the main proceedings' judge, who requested an advisory opinion from the TPR through Paraguay's court of highest instance.

b.a. The decision of the *Tribunal Permanente de Revisión*

All arbitrators were unanimous, in spite of different legal grounds, that the Protocol of Buenos Aires is applicable to the case presented to the TPR. They also clarified that the bilateral contract to trade Argentinean goods in Paraguay is a sales and distributions contract, which is, according to Article 2 (6) of the Protocol of Santa Maria, explicitly excluded from its scope. In addition, since the Protocol of Santa Maria on the international jurisdiction for claims involving consumer relations was not yet in force, the arbitrators concluded that it could not be applicable at all. Also, the Protocol of Buenos Aires becomes applicable to the type of contract of the parties when their domiciles or rather headquarters are in different MERCOSUR Member States.⁹⁹⁹ Moreover, the contract among the parties made explicit reference to the Protocol of Buenos Aires as well.

The TPR even expressly applied the *Costa v. ENEL* case law as well as the *Dassonville* and *Cassis de Dijon* formulas. Thus, the TPR declared for the very first time that MERCOSUR law takes precedence over national law, which in the case was the Paraguayan law Nr. 194 of the year 1993.

b.b. The decision of the national court after the *Opinión Consultiva*

After the TPR concluded in its first advisory opinion that the Protocol of Buenos Aires is applicable in the litigation between *Norte S.A. Importación-Exportación* (from Paraguay) and *Laboratorios Northia S.A.C.I.F.I.A.* (from Argentina) rather than national law or the Protocol of Santa Maria, the *Juzgado de Primera Instancia en lo Civil y Comercial del Primer Turno de la ciudad de Asunción* had to declare to be in favour of or against it, justify its reasons, and settle the dispute at national level.

⁹⁹⁹ Art. 1 section (a) of the Protocol of Buenos Aires.

The Paraguayan judge of first instance criticised some arguments of the TPR in the beginning of her final decision.¹⁰⁰⁰ She disagreed *inter alia* that national judges are to decide on the question of whether or not a choice of law and jurisdiction clause violates international public order¹⁰⁰¹ – she was thereby indirectly expressing that she did not feel capable enough to decide on such a thing alone – and implied that this was one of the reasons for why she did not judge the case without first knowing the arguments of a court like the TPR.

The Paraguayan judge decided, as a result, to declare to consider herself not competent to adjudicate upon the case between *Norte S.A. Importación-Exportación* and *Laboratorios Northia S.A.C.I.F.I.A.* and, consequently, affirmed to consent to the TPR's advisory opinion. This was in favour of a 'primacy' of MERCOSUR law over national law that other national judges may contribute to create and strengthen. The Paraguayan judge also stated in her decision that the courts defined in the contract signed by the parties, namely the courts of the city of Buenos Aires, have exclusive jurisdiction to decide on any issue arising from rights and obligations linked to the contract. Furthermore, she argued that the Protocol of Buenos Aires matches well to the EC Convention on Jurisdiction and the Enforcement of Judgements in Civil and Commercial Matters of 1968,¹⁰⁰² because both determine the rules for the determination of jurisdiction in civil and commercial matters between private persons within a private international law context. The Paraguayan judge even quoted the ECJ verdict of the case *Francesco Benincasa/Dentalkit Srl*.¹⁰⁰³

The argument that a decision of a Paraguayan court might be against the principle of "mutual trust in the administration of justice in the Community"¹⁰⁰⁴ was also picked up by the court. She pointed out that the aforementioned EU principle should also apply within the MERCOSUR and explained that this principle is not just legal

¹⁰⁰⁰ Decision of 29th August 2007.

¹⁰⁰¹ In reality, the term used in the *Opinión Consultiva* of the TPR was regional public order and it should mean the *ordre public* of the Mercosur.

¹⁰⁰² It is now governed by the EU Council Regulation Nr. 44/2001.

¹⁰⁰³ ECJ C-269/95 paragraphs 26 and 32.

¹⁰⁰⁴ The principal of mutual trust in the administration of justice in the Community (now the EU) is in section 16 of the preamble of EU Council Regulation Nr. 44/2001 and concerns the jurisdiction as well as recognition and enforcement of judgments in civil and commercial matters within the European Union.

doctrine, but is already in the text of the Protocol of Buenos Aires, namely in Art. 4, which enshrines the agreement on jurisdiction.¹⁰⁰⁵

The decision of the Paraguayan judge to declare *ex officio* not to be competent to adjudicate upon the case can be compared to what Art. 25 of EU Council Regulation Nr. 44/2001 says, namely:

“where a court of a Member State is seised of a claim which is principally concerned with a matter over which the courts of another Member State have exclusive jurisdiction by virtue of Article 22, it shall declare of its own motion that it has no jurisdiction.”

The judge also emphasised that the principle of mutual trust in the administration of justice in a community of States has been constantly applied by the ECJ in legal disputes involving the 1968 Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters. She also cited two cases¹⁰⁰⁶ and mentioned that *Norte S.A. Importación-Exportación* and *Laboratorios Northia S.A.C.I.F.I.A.* voluntarily agreed in their contract about the jurisdiction of the courts of the city of Buenos Aires with reference to Articles 1 and 2 of the Protocol of Buenos Aires.

With regard to the Paraguayan law Nr. 194/1993¹⁰⁰⁷ and Art. 3 of the Paraguayan Code of Civil Procedure,¹⁰⁰⁸ the Paraguayan judge emphasised that neither one should take precedence over the Protocol of Buenos Aires. This understanding follows from Art. 137 of the Paraguayan Constitution.¹⁰⁰⁹

¹⁰⁰⁵ It corresponds to Art. 23 (1) of EU Council Regulation Nr. 44/2001.

¹⁰⁰⁶ Case C-116-02 *Gasser GmbH v. MISAT Srl.*, paragraphs 67 and 72; Case C-159-02, *Turner v. Grovit*, paragraphs 24 and 28.

¹⁰⁰⁷ It is about contractual relationships between foreign manufactures and companies on the one side and Paraguayan natural and legal persons on the other.

¹⁰⁰⁸ Art.3°.- *Carácter de la competencia. La competencia atribuida a los jueces y tribunales es improrrogable. Exceptuase la competencia territorial, que podrá ser prorrogada por conformidad de partes, pero no a favor de jueces extranjeros, salvo lo establecido en leyes especiales.*

¹⁰⁰⁹ Artículo 137 - DE LA SUPREMACIA DE LA CONSTITUCION

La ley suprema de la República es la Constitución. Esta, los tratados, convenios y acuerdos internacionales aprobados y ratificados, las leyes dictadas por el Congreso y otras disposiciones jurídicas de inferior jerarquía, sancionadas en consecuencia, integran el derecho positivo nacional en el orden de prelación enunciado.

Even if the Paraguayan law Nr. 194/1993 and the Paraguayan Code of Civil Procedure would take precedence, the courts of the city of Buenos Aires would still have the jurisdiction over any dispute arising from the contract concluded between the parties. This is because the contract contained a choice of law clause in favour of Argentinean law and provided for the exclusive jurisdiction of the courts of the city of Buenos Aires. Even if the contract had not made explicit reference to the MERCOSUR law of integration and, in particular, the Protocol of Buenos Aires, the companies *Norte S.A. Importación-Exportación* and *Laboratorios Northia S.A.C.I.F.I.A.* jointly agreed on the competent courts and indicated this agreement in their contract.

Lastly, the judge emphasised that her initial statement about not being competent to decide the present case is in accordance with the principle *iura novit curia* and her duty to adjudicate in accordance with the law,¹⁰¹⁰ besides the jurisprudence of Paraguay's court of highest instance, which stipulates that law Nr. 194/1993 overrules choice of law and forum agreements that fall under its jurisdiction, provided that the Protocol of Buenos Aires is not applicable.

b.c. Final Remarks

The analysis above allows the conclusion that there was access to justice. This is because of four reasons. First, the Paraguayan judge agreed that the *Tribunal Permanente de Revisión* should deliver an *Opinión Consultiva* and requested it

Quienquiera que intente cambiar dicho orden, al margen de los procedimientos previstos en esta Constitución, incurrirá en los delitos que se tipificarán y penarán en la ley.

Esta Constitución no perderá su vigencia ni dejará de observarse por actos de fuerza o fuera derogada por cualquier otro medio distinto del que ella dispone.

Carecen de validez todas las disposiciones o actos de autoridad opuestos a lo establecido en esta Constitución.

¹⁰¹⁰ This duty is defined by Art. 159 (e) of the Paraguayan Code of Civil Procedure as follows:

Art. 159.- Sentencia definitiva de primera instancia. La sentencia definitiva de primera instancia, destinada a poner fin al litigio, deberá contener, además:

(...)

(e) la decisión expresa, positiva y precisa, de conformidad con las pretensiones deducidas en el juicio, calificadas según correspondiere por la ley, declarando el derecho de los litigantes, y, en consecuencia, condenando o absolviendo de la demanda o reconvención, en su caso, en todo o en parte;

through Paraguay's court of highest instance. Second, TPR arbitrators were unanimous in their ruling, decided that the Protocol of Buenos Aires was applicable and provided explanations that included reference to case law of the European Court of Justice. Third, the *Juzgado de Primera Instancia en lo Civil y Comercial del Primer Turno de la ciudad de Asunción* declared to be in favour of the TPR decision and justified its reasons in a surprising style, namely by mentioning among the legal grounds not only the TPR decision but also more ECJ jurisprudence¹⁰¹¹ and EU Council Regulation Nr. 44/2001, before settling the dispute at the national level. Fourth, the original intentions of the parties concerning the contract's choice of law clause in favour of Argentinean law and provided for the exclusive jurisdiction of the courts of the city of Buenos Aires were respected by the decision of the TPR and the decision of the national judge.

One must also take into consideration that the work of Paraguay's national judges with MERCOSUR issues is less challenging than in countries like Brazil and Uruguay, since Paraguayan law is more pro-MERCOSUR¹⁰¹² and the jurisprudence of Paraguay's court of highest instance is pro-MERCOSUR too. These two factors of substantive and procedural order facilitate national verdicts to be coherent with both MERCOSUR law and TPR jurisprudence.

The role played by the Paraguayan judge of the *Juzgado de Primera Instancia en lo Civil y Comercial del Primer Turno de la ciudad de Asunción* may be compared to the role of an agent of the MERCOSUR legal order. Her work benefited MERCOSUR's rule of law and has been crucial to both delivering a consistent interpretation and promoting access to justice, even though she had rather the function of an '*aplicadora*' ('enforcer', in English) of MERCOSUR law.

¹⁰¹¹ Case C-269/95, *Francesco Benincasa v. Dentalkit Srl.*, paragraphs 26 and 32; Case C-116-02 *Gasser GmbH v. MISAT Srl.*, paragraphs 67 and 72; Case C-159-02, *Turner v. Grovit*, paragraphs 24 and 28.

¹⁰¹² Like Argentinean law, but differently from Brazilian law and Uruguayan law. For more details, see 'Brazilian Constitutional Law and International Treaties' and 'Legal Sources of the Mercosur', respectively, in this thesis.

12. Case law at national level

As we have seen in several parts of this thesis, national judges can play a very important role in the MERCOSUR. In fact, until 2006, they applied MERCOSUR law more than 1,700 times.¹⁰¹³ As a result, natural and legal persons depend mostly on national judges.

The lower courts of the four MERCOSUR Member States decided more cases involving the norms of the bloc than their respective courts of highest instance.¹⁰¹⁴ In Brazil, there have been already 650 decisions involving MERCOSUR Law.¹⁰¹⁵ The STF decided only 80 cases of that number and the remaining actions were judged by other Brazilian courts.¹⁰¹⁶ At federal level, cases were mostly decided by the Superior Court of Justice (with its seat in Brasília), the Federal Regional Court for the 4th Region (with its seat in Porto Alegre), the remaining Federal Regional Courts¹⁰¹⁷ and the Superior Labour Court (with its seat in Brasília).¹⁰¹⁸ At the state level, sentences came from the Brazilian Federal District (Brasília, DF) and the states of Minas Gerais, Mato Grosso, Mato Grosso do Sul, Paraíba, Pernambuco, Paraná, Rio de Janeiro, Rio Grande do Sul, Santa Catarina, Sergipe and São Paulo, but most judgments at these states concerned appeals were decided by state Courts of Justice, i.e. the second instance within states and also the highest at state level.¹⁰¹⁹ So, one can see that Brazilian judges have been working with MERCOSUR law. This is particularly important for private persons. Nevertheless, there are no sources of information concerning the total number of cases in which parties requested the application of MERCOSUR law and it had not been applied. As a result, this makes it impossible to determine what the percentage of application was.

¹⁰¹³ Cf. Elsner, Gisela (Ed.), *Segundo informe sobre la aplicación del derecho del Mercosur por los tribunales nacionales*, Montevideo, 2007, p. 301.

¹⁰¹⁴ Klor, Adriana D. de/Perotti, Alejandro D., *El Rol de los Tribunales Nacionales de los Estados del Mercosur*, Córdoba, 2009, p. 116.

¹⁰¹⁵ The numbers are of August 2009.

¹⁰¹⁶ Klor, Adriana D./Perotti, Alejandro D., p. 116.

¹⁰¹⁷ That of the 1st Region, with its seat in Brasília; that of the 2nd Region, with its seat in Rio de Janeiro; the one of the 3rd Region, with its seat in São Paulo, and the one of the 5th Region, with its seat in Recife.

¹⁰¹⁸ Klor, Adriana D./Perotti, Alejandro D., p. 158.

¹⁰¹⁹ For more details, see the section of this thesis entitled “Present Organisation of the Brazilian Judiciary”.

Below are 4 cases that concern the 3 most frequent MERCOSUR law matters brought before national courts, namely: (1) same treatment of products in the fields of taxes, duties and other country-imposed charges, (2) judicial cooperation and assistance in civil, commercial, labour and administrative matters, and (3) equal procedural treatment of persons.

12.1. Same treatment of products in the fields of taxes, duties and other country-imposed charges¹⁰²⁰

In this subsection, two cases are presented and examined. One involves milk from Uruguay and tax authorities in the Brazilian state of Rio Grande do Sul (case “a.a.”) and one involves the confiscation of an Argentinean vehicle by the national treasury and federal tax authority of Brazil (case “a.b.”).

Case a. A suit for a mandamus concerning milk from Uruguay

The Brazilian import company *Leben Representações Comerciais*, which deals with the import of milk and dairy products in the state of Rio Grande do Sul, applied for a *Mandado de Segurança* (‘suit for a writ of mandamus’, in English)¹⁰²¹ against the tax authorities of Rio Grande do Sul in order to sell milk that has been produced and packaged in Uruguay exactly like milk that has been produced and packaged in the aforementioned Brazilian state, i.e. exempt from value added tax¹⁰²² (also known as sales tax, turnover tax or simply VAT). The legal basis was Art. 1 of the Treaty of Asunción,¹⁰²³ which, among others, provides that the common market comprises the free movement of goods and services and other factors of production between the countries by means of, among others, the elimination of customs duties and non-tariff restrictions on the movement of goods, and any other measures of equivalent effect. In addition, Art. 7 also served as legal basis, as it provides for the equal treatment of products in the fields of taxes, duties and other country-imposed charges if they

¹⁰²⁰ Art. 7 of the Treaty of Asunción.

¹⁰²¹ It is similar to the ‘Einstweilige Anordnung’ in Germany.

¹⁰²² Art. 9 of the Value Added Tax Decree of Rio Grande do Sul (State Decree Nr. 37,699 of 1997).

¹⁰²³ Decree Nr. 350 of 1991 put the Treaty of Asunción into Brazilian law.

originated in the domestic market of a signatory State and go to the domestic market of another signatory State.

With respect to this lawsuit, the first instance Brazilian judge held that national legislation may not contradict the Treaty of Asunción, because subjective individual rights derive from it.¹⁰²⁴

But, since the issue relates to state tax law and Brazilian states have different turnover tax rules for milk, the Rio Grande do Sul fiscal authority appealed. The lawsuit finished only at the *Superior Tribunal de Justiça* ('Superior Court of Justice', in English),¹⁰²⁵ which is the highest court in the country for non-constitutional matters. There, the first instance decision was affirmed and, as a result, milk from Uruguay was finally exempted from turnover tax in Rio Grande do Sul.

Case b. A suit for a mandamus concerning the confiscation of a car of an Argentinean company

A company based in Argentina and its trade representative (Mr. Tavares Guedes, of Brazilian citizenship) filed a suit in Brazil known as '*Mandado de Segurança*' (a 'suit for a writ of mandamus')¹⁰²⁶ with the aim of revoking a confiscation sanction of a vehicle, a Toyota Hilux, with Argentinean license number owned by the company that was apprehended by the Brazilian '*Fazenda Nacional*' (the national treasury and federal tax authority of Brazil), which considered the vehicle to be circulating with an irregular status in Brazil.

The plaintiff mainly sustained that Tavares Guedes is a Brazilian citizen with two domiciles – one in Brazil and another one in Argentina, is a sales representative and is

¹⁰²⁴ File reference 01197608241, 2^a Vara da Fazenda Pública, 1^o Juizado, Decision 16/98 of 13.01.1998. This case is similar to the ECJ case 228/98, *Dounias/Ypourgos Oikonomikon*, which concerned Art. 95 (later Art. 90 of the EC Treaty).

¹⁰²⁵ It is similar to the '*Bundesgerichtshof*' in Germany.

¹⁰²⁶ This '*Mandado de Segurança*' later became an '*Apelação Cível*' (a 'civil appeal' from final judgement). TRF-4^aR, 1^a Turma, AC 2008.72.00.004276-0/SC, rel. juiz Marcelo de Nardi, 17/12/08, DE (*Diário do Estado*), 21/01/09. Report available in Klor, Adriana D. de/Perotti, Alejandro D., *El Rol de los Tribunales Nacionales de los Estados del Mercosur*, Córdoba, 2009, p. 163 ff.

authorised to drive vehicles owned by the Argentinean company (i.e, the plaintiff) both in Argentina and Brazil. The plaintiff also argued that the vehicle apprehended by the Brazilian ‘*Fazenda Nacional*’ is used for business purposes by sales representatives and partners of the company, and the Treaty of Asunción has norms concerning the movement of “*veículos comunitários*” (‘community cars’) of Member States.

The rapporteur of the case at the *Tribunal Regional Federal da 4ª Região* (TRF-4ªR of Porto Alegre, Rio Grande do Sul), whose position would later be adopted by unanimity, began with the exposition of the reasoning given by the Brazilian treasury for the imposition of the penalty, as follows:

*“O fundamento para a aplicação da pena de perdimento ao veículo de propriedade do autor foi o não-cabimento da incidência da Resolução MERCOSUL 35/2002, que permite o ingresso no País, sem qualquer formalidade, somente aos veículos comunitários do MERCOSUL, de uso particular e exclusivo de turistas. Afastada essa hipótese, considerou a Receita Federal tratar-se de internação clandestina de veículo usado, cuja importação é expressamente vedada pelo art. 27 da Portaria DECEX 8/1991, com sujeição do bem à pena de perdimento, por configurar dano ao erário.”*¹⁰²⁷

However, the rapporteur dismissed from the beginning the thesis of the treasury and stated that:

“não é este, porém o caso dos autos. A integração entre os países membros do MERCOSUL é realizada pelos que transitam diariamente

¹⁰²⁷ It refers to Resolution Nr. 35/02 of the Common Market Group (‘*Normas para la circulación de vehículos de turistas, particulares y de alquiler, en los Estados Partes del MERCOSUR*’ – i.e., ‘Guidelines for the circulation of tourist, private persons and rental vehicles in the Member States of the MERCOSUR’).

Art. 2 provides that, once this resolution enters into force in the MERCOSUR, resolutions GMC Nr. 76/93 and Nr. 131/94 shall become ineffective. Resolution Nr. 131/94 is about the ‘*Circulación de vehículos comunitarios del MERCOSUR de uso particular exclusivo de los turistas*’ (i.e., ‘circulation of MERCOSUR community vehicles used for private purposes by tourists’).

Art. 3 defines that the Member States of the MERCOSUR shall incorporate this resolution into their national legal systems before 30th November 2002.

entre um país e outro, movimentando e dinamizando a economia, o comércio, as finanças, a cultura, e, desse modo, efetivando o disposto no Tratado de Assunção.

A instituição de um mercado comum implica a livre circulação de bens, serviços e fatores produtivos entre os países, através, entre outros, da eliminação dos direitos alfandegários e restrições não tarifárias à circulação de mercadorias e de qualquer outra medida de efeito equivalente (art. 1º).

O direito à livre circulação de bens é assegurado pelo Tratado de Assunção, diploma incorporado ao ordenamento jurídico interno, que prevalece sobre as normas infralegais. É a partir desse contexto que deve ser compreendido o caso em exame.

O fato de não estar caracterizada nenhuma das hipóteses da Resolução 35/2005 [do Grupo Mercado Comum], que trata de apenas uma das formas de internação temporária autorizadas (ingresso de veículos comunitários do MERCOSUL, de uso particular e exclusivo de turistas), não conduz à conclusão pretendida pela União de que todas as demais estariam vedadas.”

The same judge strengthened its position with precedents of the same court. In this regard he affirmed, among other things, that:

“a jurisprudência tem reconhecido que o proprietário de veículo estrangeiro tem o direito a circular livremente no território brasileiro, desde que seja ele domiciliado no país de procedência do bem, ou, ainda que também tenha domicílio no Brasil, existirem razões concretas para o trânsito entre os países, tais como vínculos de natureza familiar e negocial.”¹⁰²⁸

The rapporteur continued in the *sub examine*, as follows:

¹⁰²⁸ He quoted cases TRF-4ªR, AC 2000.70.02.003119- 3/PR and AC 2001.70.03.002841-9/PR.

“o veículo de propriedade da empresa impetrante era conduzido por um dos representantes comerciais e estava circulando no País transitoriamente. De fato, foram juntados aos autos documentos comprobatórios do duplo domicílio do representante comercial – em São Leopoldo/RS e em Mercedes, na Argentina – e do contrato social da empresa, sediada em Buenos Aires. Ressalte-se que o veículo apreendido é de propriedade da empresa impetrante, que inclusive expediu autorização para condução do veículo no Brasil e na Argentina... em favor dos seus representantes comerciais. É de presumir, portanto, que o veículo seja utilizado temporariamente para o trânsito entre os países, em razão do estreito vínculo negocial da empresa com o Brasil.”

The panel responsible for the case followed the reasoning above, had a shared decision, and ordered the return of the seized vehicle.¹⁰²⁹

It is worth pointing out some additional aspects linked to this judgement. First, the circulation of vehicles of MERCOSUR citizens who are not tourists but traders in the territory of other States Parties, with a result like the one of the present case in Brazil, has been a highly reiterated matter. Similar situations have more potential to happen in cities located in border areas, especially those on the border of Brazil and Uruguay, where there is no river, lake or lagoon in some parts of it. This is the case of Santa do Livramento in Brazil and Rivera in Uruguay as well as Chui in Brazil and Chuy in Uruguay, which Klor and Perotti¹⁰³⁰ define as literal ‘binational’ cities.¹⁰³¹ Some citizens of these areas also live on the one side of the border but work on the other side and have to cross it every day. One of the consequences of this circumstance is that vehicles also cross the border for commercial purposes. There are thus many judgements that are similar to the one of the present case. There were cases with the same outcome not only at the TRF-4^aR but also at the STJ, which received appeals and confirmed TRF-4^aR judgements.

¹⁰²⁹ The details of the report were taken from Klor, Adriana D. de/Perotti, Alejandro D., *El Rol de los Tribunales Nacionales de los Estados del Mercosur*, Córdoba, 2009, p. 163 ff.

¹⁰³⁰ Klor, Adriana D. de/Perotti, Alejandro D., 2009, p. 165.

¹⁰³¹ In fact, in the case of Santana do Livramento, people simply cross a street to enter Uruguay.

Therefore, it can be argued that Brazilian federal judges have been performing to some degree a legality control with regard to Common Market Group resolutions and provisions of the Treaty of Asunción.

12.2. Judicial cooperation and assistance in civil, commercial, labour and administrative matters¹⁰³²

In a decision of an *Ação Monitória* ('Action on a non-executory written instrument', in English),¹⁰³³ the *Tribunal de Justiça de São Paulo* (the 'São Paulo State Appellate Court', in English)¹⁰³⁴ considered unnecessary the translation of documents from the Spanish to the Portuguese language. The court considered these documents released from translation because of the Brazilian Decree Nr. 2,067/96,¹⁰³⁵ which implements in Brazilian Law the Protocol of Las Leñas on judicial cooperation and assistance in civil, commercial, labour and administrative matters.¹⁰³⁶ Pursuant to Art. 25 of this Protocol, certain public documents issued in another MERCOSUR Member State shall have the same probative force as national public documents of the same kind produced by local authorities in the country. Articles 26 and 27 determines which the documents are meant, how they should be delivered at courts of other Member States and makes clear that they are released from any legalisation, authentication, certification or similar formalities when they have to be brought forward as evidence in the sovereign territory of another MERCOSUR Member State.

12.3. Equal Procedural Treatment¹⁰³⁷

In Argentina, the *Cámara Nacional de Apelación en lo Comercial* ('National Chamber of Appeals in Commercial Matters', in English) affirmed a decision of the

¹⁰³² For details, see the Protocol of Las Leñas.

¹⁰³³ The equivalent to a '*Mahnverfahren*' in Germany.

¹⁰³⁴ The equivalent to an '*Oberlandesgericht*' in Germany.

¹⁰³⁵ Revista dos Tribunais 756, São Paulo, 1998, p. 125 ff., quoted in Basso, Maristela, *Harmonização do Direito dos Países do Mercosul*, in: Revista da Faculdade de Direito da UFPR, Vol. 33, 2000, p. 106.

¹⁰³⁶ Council Decision Nr. 5/92.

¹⁰³⁷ Art. 3 and Art. 4 of the Protocol of Las Leñas.

lower instance. In this case,¹⁰³⁸ the Protocol of Las Leñas on judicial cooperation and assistance in civil, commercial, labour and administrative matters has been applied *ex officio*. The subject matter of the dispute was a pecuniary claim from an Argentinean citizen against another Argentinean citizen. The claimant was a resident of Punta del Este, in Uruguay, and the defendant a resident of Argentina.

In the trial, the defendant claimed that the Hague Convention on Civil Procedure of March 1954¹⁰³⁹ was not applicable because the Republic of Uruguay was not a signatory state, and demanded that the plaintiff gives a bond in court for the costs of the proceedings, since he was neither a resident nor had assets in Argentina, which is in accordance with Art. 348 of the Argentinean Code of Civil and Commercial Procedure. The text of Art. 348 is similar to the old version of § 110 of the German Code of Civil Procedure,¹⁰⁴⁰ which has been repeatedly criticised by the European Court of Justice as it violated both the non-discrimination rule of Art. 6 of the EC Treaty and Art. 4 of the European Economic Area Agreement,¹⁰⁴¹ which was signed in 1993.

Both the court of first instance and the National Chamber of Appeals in Commercial Matters rejected an obligation of the plaintiff to give a bond in court for the costs of the proceedings. The court of appeals based its decision on the right to equal procedural treatment, which is provided in Art. 3 and Art. 4 of the Protocol of Las Leñas. Article 3 specifies that citizens and permanent residents of any of the Member States shall have free access to the courts of the other Member States on the same basis as nationals and permanent residents in order to protect their rights and interests, including bodies corporate constituted, authorised or registered in accordance with the laws of any of the Member States. Art. 4 also provides that no requirement of security or deposit of any kind may be imposed on nationals or permanent residents of another

¹⁰³⁸ CNCom., Turma B, “Mochon, César R./Delibano Elorrieta, Norma M.”, s/Sumário, expte. Nr. 34.696/02 of 17 March 2003.

¹⁰³⁹ Was implemented in Argentina with law Nr. 23.502/87 and is in force since 9th July 1988.

¹⁰⁴⁰ The former version of §110 established that foreign nationals were obligated to provide security for legal procedural costs before national courts, i.e. this security was linked to the nationality of the parties. For details, see Stein, Friedrich/Jonas, Martin, *Kommentar zur Zivilprozessordnung*, 22nd ed., Vol. 2, 2004, p. 658.

¹⁰⁴¹ The current version of the German Code of Civil Procedure, in force since 1st October 1998, goes back to the jurisprudence of the ECJ. For more details, see *Neue Juristische Wochenschrift* 1993, 2431; 1996, 3407; 1997, 3299; 1998, 2127.

Member State by reason of their status as nationals or permanent residents of another Member State, including bodies corporate constituted, authorised or registered in accordance with the laws of any of the Member States.

The request of advance payment of charges, fees and bonds from the plaintiff simply because he is a permanent resident of Uruguay is, thereby, prohibited.

13. Chapter conclusion

In this chapter, I have examined the institutional and legal structure of the MERCOSUR from a historical and comparative standpoint, have made reference to national legal systems, especially that of Brazil, and also to the supranational legal system of the European Union and the international legal system of the World Trade Organization. The study presented here complements the preceding chapters of this thesis and has made due reference to human rights in both substantive law and case law. Furthermore, fundamental rights and constitutional aspects of Brazilian and MERCOSUR law, especially with reference to access to justice, have also been examined and discussed.

As explained in the interim balance of the MERCOSUR, the organisation has been successful in increasing the economic integration of its region to a certain extent. It has also been promoting peace, democracy and stability since it was established in 1991. Moreover, the common market showed progress and the bloc's political dimension gained more importance. Nevertheless, there is still much to be done.

With an intergovernmental model that is based on the classical perceptions of sovereignty and public international law, the MERCOSUR has two dualist countries – i.e., Brazil and Uruguay – two monist countries – i.e., Argentina and Paraguay – and one country that is both monist and dualist – i.e., Venezuela. Differently from the situation in Brazil and Uruguay, the Paraguayan and Argentinean constitutions were reformed after the Treaty of Asunción, which created the MERCOSUR in 1991. The reforms were made in order to guarantee that MERCOSUR norms have the same status of constitutional norms. The process of implementation of MERCOSUR norms

in Paraguay and Argentina is, as a consequence, quicker and more efficient than in Brazil and Uruguay.

With regard to access to justice in the MERCOSUR, it has to be pointed out that it is not uniform, but an outcome of an incomplete integration process with deficient legal and political systems. While advisory opinions represent a major improvement, they do not guarantee uniform legal interpretations of MERCOSUR law at the national level, as the last judgement, namely the one to become nationally binding, is always delivered by national judges. With reference to private persons at the MERCOSUR level, the former have neither access to arbitral tribunals nor to the TPR, unlike private persons in the EU with regard to the CJEU. Private persons in the MERCOSUR depend, as a result, on the diplomatic protection of their countries, similar in some degree to the situation at the WTO, in order to defend their interests in the bloc's dispute settlement system. This an arduous and complicated task, as it depends on legal and political conditions, as explained in the section 'Access to Justice in the MERCOSUR'. A supranational court, as advocated by numerous authors, does seem to be necessary even though some arbitrators of the TPR¹⁰⁴² believe that the dispute settlement system of the MERCOSUR should rather follow NAFTA's model. For the purposes of this thesis, it is important to highlight that a court with supranational status may finally allow private persons of the MERCOSUR Member States – i.e., both private natural and private legal persons – to have access to justice and create a legal regime that respects social and individual rights, equality before the law, liberty, security, development, market freedom and justice as supreme values.¹⁰⁴³ At the present time, private persons may be considered almost defenceless at the MERCOSUR dispute settlement system, as has already been explained.

Private parties may have an active participation in the process of trade liberalisation by means of complaints to defend their interests. Ignoring the key role of private parties in a process of economic integration might generate risks that may well jeopardise the integration aims.

¹⁰⁴² For instance, Jorge Fontoura, who is the current President of the *Tribunal Permanente de Revisión*.

¹⁰⁴³ These are some of the principles listed in the preamble of the Brazilian Constitution.

A supranational court could, furthermore, improve the MERCOSUR law of integration by following a more common law rather than civil law approach like the ECJ/CJEU has performed. This might be another challenging task, because there is no common law country among the MERCOSUR Member States.

Other bodies representing citizens – i.e., bodies like the European Commission, European Council and European Parliament – are certainly very welcome, but sound very utopian because of the legal and political barriers existing in the Member States, especially in Brazil and Uruguay, which are dualist and their legal orders always allow new norms to be contrary to the norms of earlier international instruments.¹⁰⁴⁴ The PARLASUR, on the other hand, brings new hopes. Although it is institutionally weak in its current form, direct elections of MERCOSUR parliamentarians are likely to generate a new impetus, especially among politicians, with regard to MERCOSUR matters.

Concerning the national level, it is worth referring to *Canotilho*. He emphasises that Germany showed to the world the importance of national jurisprudence in the protection of human rights, as its *Bundesverfassungsgericht* developed a national law with “*fortes acentuações judicialistas*”¹⁰⁴⁵ – the expression in English could be ‘a national law with strong judicial intonation’. This judicial intonation, according to *Canotilho*, is comparable to the U.S. judicial intonation,¹⁰⁴⁶ which *Hughes* summarises as follows: “We are under a Constitution but the Constitution is what the judges say it is”.¹⁰⁴⁷ A MERCOSUR law ‘with strong judicial intonation’ may thus also be created by national judges.¹⁰⁴⁸ And, if judges can say what the Constitution is or even provide widened interpretations, national judges may even constitutionalise MERCOSUR law or the Asunción Treaty. A step too far or something out of the question are just two of the potential opinions that many lawyers might have about this proposition. But most lawyers in Europe back in the 1960s, 70s and 80s also had

¹⁰⁴⁴ In the case of Brazil, there are three exceptions to this rule, namely: international treaties about human rights, extradition of non-nationals and taxation matters. For more details, see the section ‘Brazilian Constitutional Law and International Treaties’ in Chapter III.

¹⁰⁴⁵ *Canotilho*, 1998, p. 19.

¹⁰⁴⁶ *Ibid.*

¹⁰⁴⁷ *Hughes*, Charles E., *Speech*, Elmira, New York, 3rd May 1907, quoted in *Canotilho*, 1998, p. 18.

¹⁰⁴⁸ For details, see the section of this thesis named ‘Private Persons’.

sceptical views about the development of the European Communities and its ‘community law’.

Even though the name MERCOSUR means ‘Common Market of the South’, it does not represent a common market, but an unfinished free trade area and customs union. And, although the citizens of its Member States have passports with the names ‘MERCOSUR’ (i.e., in Argentinean, Paraguayan and Uruguayan passports)¹⁰⁴⁹ and ‘Mercosul’ (i.e., in Brazilian passports) printed above the names of their own countries, like the passports of citizens of the European Union, it seems that a ‘complete MERCOSUR citizen’ does not exist. This is because, at MERCOSUR level, the citizens of its Member States cannot have access to one of the most important existing human rights, namely the right of access to justice. And, if one considers citizenship as a component of rule of law – like, for instance, freedom, one may come to the worthy of criticism conclusion that there is no rule of law in the MERCOSUR legal system. For *Rawls*, freedom is a complex of rights and obligations defined by social institutions, is incompatible with tyrannical and anarchic regimes, and is essential to ensure equality and justice.¹⁰⁵⁰ Furthermore, other experiences among countries suggest that no economic bloc with the ambition of becoming a common market with an effective free movement of persons, goods and services and due respect for human rights rather than only economic rights can succeed without a supranational power that guarantees citizens’ rights and obligations in the economic, social and political fields.

Thus, since the European Union, the WTO and the MERCOSUR are products of political and legal improvements linked to economic globalisation and the search for peace among peoples at the supranational, international and regional levels, respectively, it can be concluded that a regional constitutionalism that results of a law of integration ‘with strong judicial intonation’¹⁰⁵¹ is the most appropriate path to be followed in the MERCOSUR.

¹⁰⁴⁹ Soon also in Venezuelan passports.

¹⁰⁵⁰ Figueiredo, p. 53.

¹⁰⁵¹ As performed by the German *Bundesverfassungsgericht* and emphasised by Canotilho (Canotilho, 1998, p. 19).

Chapter V

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The WTO Dimension of Access to Justice

1. Introduction to Chapter V

This chapter is dedicated to the supreme organ of the international trading system: the World Trade Organization (WTO). With its headquarters in Geneva, Switzerland, it was established on 1st January 1995 as a result of the eighth and final round of negotiations of the General Agreement on Tariffs and Trade (GATT), the Uruguay Round (1986 - 1994).

As mentioned in the section ‘Economic Justice’ in Chapter II of this thesis, GATT 1948 was created to regulate international economic relations temporarily, but has been an instrument that, for more than 40 years, has disciplined trade relations between sovereign countries. Differently from the WTO, GATT 1948 has never formally been an international organisation for trade, but it became *de facto*.¹⁰⁵² Despite that, it was the only multilateral instrument dealing with international trade from 1948 until the establishment of the WTO.¹⁰⁵³ A summarised definition about what the organisation is can be found at its official website. The WTO is defined there as follows:

“There are a number of ways of looking at the WTO. It’s an organization for liberalizing trade. It’s a forum for governments to negotiate trade agreements. It’s a place for them to settle trade disputes. It operates a system of trade rules. (But it’s not Superman, just in case anyone thought it could solve — or cause — all the world’s problems!)”¹⁰⁵⁴

¹⁰⁵² This view (i.e., GATT 1948 not formally being an international organisation for trade) is also shared by Professor Petros C. Mavroidis.

¹⁰⁵³ Figueiredo, p. 111.

¹⁰⁵⁴ World Trade Organization, *Understanding the WTO*, to be found at www.wto.org/english/thewto_e/whatis_e/tif_e/factl_e.htm. Date of access: 15th March 2013.

WTO members can be Nation States and also territories that constitute free trade areas and/or customs unions¹⁰⁵⁵ and possess full autonomy to conduct external commercial relations. The WTO currently has 159 members.¹⁰⁵⁶

2. The WTO dispute settlement system in light of the overall objectives of the WTO

In this section, I intend to briefly describe the stages that constitute the WTO dispute settlement system. I must point out that the WTO Dispute Settlement Body (DSB) is a political institution composed of representatives of the governments of its Members and most of these representatives are diplomats. It is also important to clarify that the litigants may also opt for the alternative arbitration mode,¹⁰⁵⁷ from which an agreement between them will result without a Panel and Appellate Body adjudication.

As an organisation that serves as the common institutional framework for its members in the conduct of independent and intergovernmental trade relations between them, the WTO has political, economic, and social purposes. All WTO functions can be found in Art. III of its establishing agreement. The text is as follows:

Article III

Functions of the WTO

1. The WTO shall facilitate the implementation, administration and operation, and further the objectives, of this Agreement and of the Multilateral Trade Agreements, and shall also provide the framework for the implementation, administration and operation of the Plurilateral Trade Agreements.

¹⁰⁵⁵ A supranational organisation in the case of the European Union (for legal reasons, until 30th November 2009 the EU was officially known in the WTO as the 'European Communities'). The European Commission represents all EU Member States at almost all WTO meetings. The 27 EU Member States are also WTO Members in their own respective rights.

¹⁰⁵⁶ Data of 2nd March 2013 to be found at www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm .
Date of access: 15th March 2013.

¹⁰⁵⁷ For details, see Art. 25 of the DSU.

2. The WTO shall provide the forum for negotiations among its Members concerning their multilateral trade relations in matters dealt with under the agreements in the Annexes to this Agreement. The WTO may also provide a forum for further negotiations among its Members concerning their multilateral trade relations, and a framework for the implementation of the results of such negotiations, as may be decided by the Ministerial Conference.
3. The WTO shall administer the Understanding on Rules and Procedures Governing the Settlement of Disputes (hereinafter referred to as the "Dispute Settlement Understanding" or "DSU") in Annex 2 to this Agreement.
4. The WTO shall administer the Trade Policy Review Mechanism (hereinafter referred to as the "TPRM") provided for in Annex 3 to this Agreement.
5. With a view to achieving greater coherence in global economic policy-making, the WTO shall cooperate, as appropriate, with the International Monetary Fund and with the International Bank for Reconstruction and Development and its affiliated agencies.

Salvio and *Cabral* provide a concise description of the organisation's role as follows:

"Its role includes hosting negotiations of trade agreements, settling trade disputes, monitoring national trade policies of Member States and providing technical assistance to developing countries."¹⁰⁵⁸

Being a member of this organisation implies 'losing' part of the classical national sovereignty by accepting a shared sovereignty. But it is important to make a distinction between the WTO dispute settlement mechanism and the WTO as an intergovernmental organisation. *Howse* explains that:

¹⁰⁵⁸ *Salvio, Gabriella G. L. de/Cabral, Jeanine G. S., Considerations on the Mercosur dispute settlement mechanism and the impact of its decisions in the WTO dispute resolution system*, Barcelona, 2007, p. 14 (Paper presented at the 5th annual Conference of the Euro-Latin Study Network on Integration and Trade – ELSNIT, 26th and 27th October 2007, in Barcelona), to be found as an electronic resource at the website of the Inter-American Development Bank at www.iadb.org/intal/intalcdi/PE/2012/11120a10.pdf. Date of access: 14th March 2013.

“contrary to what is widely believed and regardless of what kind of power or influence it actually wields (the question of real-world control), as a matter of legal form, only the dispute settlement organs have been granted effective authority, through compulsory jurisdiction and effective automaticity in the legally binding character of final dispute settlement rulings, with countermeasures authorized in response to continuing non-compliance. No *regulatory* powers have been delegated or conferred on the WTO.”¹⁰⁵⁹

One can also argue that staying competitive in an always more competitive international environment is more important than having more or less sovereignty. Besides, when a country agrees to become a WTO Member, it is exercising its internationally recognised sovereignty. The WTO can also be used – in fact, as *Howse* explains, has already been used – by governments to strengthen internal sovereignty.¹⁰⁶⁰ The same author argues that the effects of participation in the WTO system depend on governance at the domestic or local level. He cites China as an example of how WTO accession and WTO rules can change internal political and economic programs.¹⁰⁶¹

The dispute settlement system of the WTO resulted from the Uruguay Round, through Annex 2 of the Agreement of Marrakech, and represents an advancement compared to the old GATT, since it became clearer and more organised.¹⁰⁶² The Marrakesh Agreement plus its covered agreements – i.e., the WTO agreements – lists the principles of trade liberalisation and the exceptions that are allowed, besides the Members’ commitments concerning the reduction of barriers to trade and the opening of non-agricultural and services’ markets. The main objective of the system is to generate certainty and predictability in the multilateral trading system.

¹⁰⁵⁹ Howse, Robert, *Sovereignty, Lost and Found*, In: Shan, Wenhua/Simons, Penelope/Singh, Dalvinder, *Redefining Sovereignty in International Economic Law*, Oxford and Portland, Oregon, Hart Publishing, 2008, p. 65.

¹⁰⁶⁰ For details, see *ibid.*, p. 71.

¹⁰⁶¹ *Ibid.*, p. 72.

¹⁰⁶² Figueiredo (p. 115), for instance, is one of those who subscribes to that view.

Consultations between the litigants represent the first step in the WTO dispute settlement system.¹⁰⁶³ This is a diplomatic stage in which an agreement is sought. These consultations must take place within a time-frame of 30 days or as agreed between the parties. If the deadline expires, the consultation is not carried out or there is no solution by common consent, the complainant may request the creation of a panel to settle the dispute. A panel usually consists of 3 experts, but may have 5 experts if the parties decide in a common agreement.¹⁰⁶⁴ Experts should deliberate confidentially on legal and factual aspects and rule in a report within 6 to 9 months from the date the Panel was established and from the determination of its terms of reference.¹⁰⁶⁵ However, these periods of time may vary due to the nature of the issue involved and the dynamics of the negotiation process.¹⁰⁶⁶ The *United States gasoline* case of 1996 (*Venezuela and Brazil versus United States*)¹⁰⁶⁷ is an example of a longer time-frame, as it took 2 years and 7 months to finish. With regard to that, *Horn et al.* provide other examples that demonstrate that panels always go beyond the 6-9 month deadline.¹⁰⁶⁸ Parties can also make comments, after which a final report will be issued and distributed to the members. Differently from an international judicial body, in the WTO this report does not have the legal effects of a court judgment, as it has to be approved by the WTO Members through the DSB in order to become binding. Thus, there is not much difference from the old GATT at this point, and it continues to be a report. Nevertheless, while in the old GATT there was ‘affirmative consensus’, according to which all Members had to approve the decisions of the judging body (even those parties who lost the cases), in the current system there is a ‘negative consensus’ (also known as ‘reverse consensus’), according to which a report is not

¹⁰⁶³ These consultations are direct and may involve mediation, good offices and the WTO Director-General.

¹⁰⁶⁴ Art. VIII.5 of the DSU: “Panels shall be composed of three panelists unless the parties to the dispute agree, within 10 days from the establishment of the panel, to a panel composed of five panelists. Members shall be informed promptly of the composition of the panel.”

¹⁰⁶⁵ Pereira, Ana C. P., *Sistema de Controvérsias na OMC: teoria e prática*, In: Pereira, Ana C. P. (Ed.), *Direito Internacional do comércio: mecanismos de solução de controvérsias e casos concretos na OMC*, Rio de Janeiro, 2003, p. 39 f., quoted in Silva, Alice R. da, *Direito internacional público e soberania na Constituição brasileira: aplicação de decisões do Órgão de Solução de Controvérsias da Organização Mundial do Comércio (OMC) no ordenamento jurídico brasileiro*, In: *Revista Jurídica*, Brasília, Vol. 8, Nr. 80, Aug./Sept. 2006, p. 78.

¹⁰⁶⁶ Art. XII.8 of the DSU: “(...) In cases of urgency, including those relating to perishable goods, the panel shall aim to issue its report to the parties to the dispute within three months.”

¹⁰⁶⁷ *United States – Standards for reformulated and conventional gasoline*, Panel report WT/DS2/R and Appellate Body report WT/DS2/AB/R.

¹⁰⁶⁸ Horn, Henrik/Johannesson, Louise/Mavroidis, Petros C., *The TWO Dispute Settlement System 1995-2010: Some Descriptive Statistics*, in: *Journal of World Trade* 45, Nr. 6, 2011, pp. 1107-1138.

accepted if there is a disapproval of all Members, including the party who won the case. Today, there is also the possibility of appealing the findings of the Panel before a second instance, namely the Appellate Body, where the negative consensus also applies. The current system is, therefore, more efficient than the previous one.

Weiler¹⁰⁶⁹ explains that each Panel is a universe unto its own, because Panellists are selected in an *Ad Hoc* and individualistic manner. I completely agree with him that this way of selecting Panellists:

“was consistent perhaps with an era in which the prime task was to resolve discrete disputes, but not with an era in which Panel decisions are part of a broad normative binding matrix, involving delicate socio-economic issues, and in which, consequently outcomes are relevant far beyond the specific parties to the dispute itself.”¹⁰⁷⁰

In addition, the same author suggests continuity and more continuous contact among Panellists so that an institutional identity and self-understanding can emerge, besides also a common ethos and understanding can be created and developed.¹⁰⁷¹ He also criticises that the life experiences and professional backgrounds of Panellists have not been commensurate with the gravity and profundity of some of the most important instances.¹⁰⁷²

The DSB has to adopt the report within 60 days, except for the case of an appeal. If there is an appeal, the Appellate Body has up to 90 days to issue its report and submit it back to the DSB. Findings of the Panel may be reversed, modified or upheld by the Appellate Body. As with the Panel report, the Appellate Body report only becomes binding after the DSB has adopted it. The losing WTO Member has to report its intentions on how to implement the ruling and recommendations established by the DSB only after the Panel report or Appellate Body report, as the case may be, has

¹⁰⁶⁹ Weiler, Joseph H.H., *The Rule of Lawyers and the Ethos of Diplomats: Reflections on the Internal and External Legitimacy of WTO Dispute Settlement*, in: Harvard Law School, *Harvard Jean Monnet Working Paper 9/00*, Cambridge, 2000, p. 11.

¹⁰⁷⁰ Weiler, 2000, p. 11.

¹⁰⁷¹ *Ibid.*

¹⁰⁷² *Ibid.*

been adopted – to be exact, within 30 days from the date of adoption. In the words of *Weiler*,

“(t)he Appellate Body, in style, content and self-understanding is a high court. It reviews Panel Reports in precisely the same way that higher courts review a first instance decision in any of our municipal legal systems. That is how it should be. And there is an inevitable spill over into the style, content and self-understanding of the Panels.”¹⁰⁷³

But *Weiler* criticises the nomenclatures ‘dispute settlement’ rather than judicial process and ‘Appellate Body’ rather than ‘High Trade Court’, ‘The International Court of Economic Justice’ or ‘The World Trade Court’. According to him, the failure to call the Appellate Body a court or high court diminishes not only the external legitimacy of the Appellate Body but also the general legitimacy of the WTO. It also robs the authority and respect that Appellate Body decisions would have if its name would match its real function and power.¹⁰⁷⁴ Another issue pointed out by the same author that is worth mentioning is the secrecy of the procedures from the moment in which a Panel is established. *Weiler* has a definition that can be considered sharp but, at the same time, also reasonable: “Only in dictatorships is “justice” administered behind closed doors.”¹⁰⁷⁵ He stresses that secrecy is inconsistent with basic principles like transparency of legal proceedings and open government,¹⁰⁷⁶ and argues that both the Panels and Appellate Body “fulfil the same function and cover the same issue based on similar norms that national courts and the ECJ fulfil in the European Union.”¹⁰⁷⁷

The implementation of rulings is of the interest of all Members, besides the WTO itself, for the reason that it makes the resolution of disputes effective, strengthens the WTO’s credibility and, consequently, benefits all Members.¹⁰⁷⁸ For the measurement

¹⁰⁷³ Weiler, 2000, p. 8.

¹⁰⁷⁴ *Ibid.*, p. 10.

¹⁰⁷⁵ *Ibid.*, p. 11.

¹⁰⁷⁶ *Ibid.*

¹⁰⁷⁷ *Ibid.*, pp. 11-12.

¹⁰⁷⁸ For more details, see DSU Art. XXI on ‘*Surveillance of Implementation of Recommendations and Rulings*’.

of the time, the rights and interests of the claimant and defendant will be taken into account.

Bacchus explains that:

“the WTO dispute settlement system is *unique*. We have much to do around our table in Geneva because, among all the international tribunals in the world, and, indeed, among all the international tribunals in the *history* of the world, ours is unique in two important ways. We have compulsory jurisdiction, and we make judgments that are enforced.”¹⁰⁷⁹

And the same author also eloquently defends that:

“(t)he WTO has moved beyond the anarchy, beyond the primitivism, and beyond the skepticism to construct a system in which international rules and international rulings are both made *and enforced*. This is the essence of our uniqueness. This is also the source of what makes the WTO so controversial to so many in the world. It is easy to ignore a tribunal whose judgments are ignored. It is impossible to ignore a tribunal whose judgments are enforced.”¹⁰⁸⁰

The first phase of the execution procedure is configured by the *communiqué* of the losing party’s claim to fulfil the decision adopted. If the party affected does not implement the ruling and recommendations of the DSB until the deadline for compliance, the second phase of the execution procedure begins. If requested, the party has to negotiate with the other party a reasonable compensation or the suspension of the application of concessions or even a retaliation that may work as sanctions for the defendant. The right to retaliate is the ultimate remedy in the WTO.

“Retaliation as an inbuilt-mechanism in the WTO DSM is aimed at enforcement. This measure is exercisable, as an option only after the

¹⁰⁷⁹ *Bacchus*, p. 9.

¹⁰⁸⁰ *Ibid.*

reasonable time for compliance has expired. The general principle of restitution is that retaliation should be effected in the same sector unless ‘practicable’ or ‘effective’.”¹⁰⁸¹

The sanctions are supposed to be linked to the public international law of cooperation and their purpose is reducing benefits of the trade interdependence context that globalisation has created. Establishing the concessions to be suspended, the period of time and other details are regulated by DSU Art. 22 – there is, furthermore, the possibility of establishing an arbitrator for that purpose. After determining all these criteria, the interested party must request the authorisation of the dispute settlement body to apply the suspension.¹⁰⁸²

The phase of implementation can be considered the most problematic.¹⁰⁸³ Although some doubt the integrity of the WTO dispute settlement mechanism, statistics show that compliance with decisions is high.¹⁰⁸⁴ One can argue that this is directly related to the mechanism’s scope, automaticity and enforceability. With regard to the scope, all agreements are covered by the same dispute settlement mechanism, which leaves no room for forum shopping. Automaticity is related to the continuous succession of different procedural phases, which might only be interrupted by the mutual agreement of the parties, and the fact that decisions can only be made ineffective by a ‘negative consensus’, which is quite rare. With reference to enforceability, it has to be said that, in cases of noncompliance by one of the parties, the other party(ies) may ask authorisation for retaliatory measures.¹⁰⁸⁵ According to *Mavroidis*, the WTO dispute settlement mechanism “is touted as being one of the most effective enforcement regimes under international trade law,”¹⁰⁸⁶ but “compliance itself is subject to the varying enforcement capacities of the different participants”,¹⁰⁸⁷ “WTO Members

¹⁰⁸¹ Mavroidis, Petros C., *On Compliance in the WTO: Enforcement Amongst Unequal Disputants*, in: *Briefing Paper* Nr. 4/2012, CUTS International, Jaipur, 2012, p. 2.

¹⁰⁸² Thorstensen, Vera, *OMC – Organização Mundial do Comércio: as regras do comércio internacional e a nova rodada de negociações multilaterais*, 2nd ed., São Paulo, 2001, p. 375, quoted in Silva, 2006, p. 79.

¹⁰⁸³ *Ibid.*

¹⁰⁸⁴ Compliance with decisions in 70% of the cases in 2006, according to Silva (2006, p. 84).

¹⁰⁸⁵ Prado, Victor L. do, *Mecanismos de solução de controvérsias: fonte de poder e de problemas na OMC*, In: Amaral Júnior, Alberto do (Ed.), *OMC e o comércio internacional*, São Paulo, 2002, p. 264-265, quoted in Silva, 2006, p. 79.

¹⁰⁸⁶ Mavroidis, 2012, p. 1.

¹⁰⁸⁷ *Ibid.*

possess unequal capacities to detect deviations which is especially true because of the absence of centralised enforcement as present in the EU”¹⁰⁸⁸ and “the ‘big’ guys have more ‘persuasive’ power in that they have more weapons to use when they decide to retaliate which increases their retaliatory power”.¹⁰⁸⁹ *Mavroidis* also explains that only the Members which:

“possess better detecting capabilities and more sophisticated administrations are in a better position to act quickly once they identify a deviation, quickly reducing the period of impunity for the deviators.”¹⁰⁹⁰

Nevertheless, according to Art. 22.1 of the DSU, the DSM has no framework to punish deviators. *Mavroidis* stresses that this was confirmed in “*EC–Bananas III* (Article 22.6, US) in 6.3”.¹⁰⁹¹

The DSU provides several types of settling disputes. These types include consultation, adjudication by the Panel and the Appellate Body and also arbitration. And rulings are “directed towards enforcing compliance”.¹⁰⁹² Paragraph 2 of Art. 3 of the DSU summarise the goals of the WTO dispute settlement system as follows:

“The dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system. The Members recognize that it serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law. Recommendation and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements.”

¹⁰⁸⁸ *Ibid*, p. 2.

¹⁰⁸⁹ *Ibid*, p. 3.

¹⁰⁹⁰ *Ibid*, p. 2.

¹⁰⁹¹ *Ibid*.

¹⁰⁹² *Ibid*, p. 1.

In the words of *Jackson*, the DSU system “embraces goals of security and predictability which are central to a “rule oriented” system.”¹⁰⁹³

For *Sacerdoti*, the mechanism incorporates elements of international judicial proceedings, bilateralism and multilateralism, legal automatism and organisational control in a set that seeks to conciliate the flexibility that is required in economic adjustments with the need to respect legal rules.¹⁰⁹⁴ Thus, it can be implied that this ‘set’ has to conciliate economic interests with the rule of law.

Despite the improvements compared to the old GATT, the current system still has some flaws, which represent challenges to all WTO Members. Some of these problems are the establishment of a reasonable period of time for the implementation of measures, the alternative between withdrawal of these measures and compensation, the appropriateness of the measures implemented and norms of international trade, the fact that the amount of the compensation is not always compensatory for the claimant and sanctions do not always generate the expected effects, among others.¹⁰⁹⁵ With regard to that, it is worth pointing out that *Weiler* argues that “[t]he diplomatic ethos which developed in the context of the old GATT dispute settlement tenaciously persists despite the much transformed juridified WTO.”¹⁰⁹⁶ He also considers that “the persistence of diplomatic practices and habits in the context of a juridical framework might end up undermining the very rule of law and some of the benefits that the new DSU was meant to produce”¹⁰⁹⁷ and argues that there is a dissonance in the WTO that is a result in part of “moving to the rule of law without realizing that it comes with a legal culture which is as integral as the compliance and enforcement dimensions of the DSU shift.”¹⁰⁹⁸ But then one has to ask ‘which rule of law?’. As I have already argued in this thesis, even if it is possible to derive a common conception of the rule

¹⁰⁹³ Jackson, John H., *Constitutional Treaties: Institutional Necessity and Challenge to International Law Fundamentals*, in: Cremona, Marise/Hilpold, Peter/Lavranos, Nikos/Staiger Schneider, Stefan/Ziegler, Andreas R. (Eds.), *Reflections on the Constitutionalisation of International Economic Law: Liber Amicorum for Ernst-Ulrich Petersmann*, Leiden/Boston, Brill, 2014, p. 197.

¹⁰⁹⁴ Sacerdoti, Giorgio, *A transformação do GATT na Organização Mundial do Comércio*, In: Casella, Paulo B./ Mercadante, Araminta de A. (Eds.), *Guerra comercial ou integração mundial pelo comércio? A OMC e o Brasil*, São Paulo, 1998. p. 64, quoted in Silva, 2006, p. 79.

¹⁰⁹⁵ Barral, Welber, *Organização Mundial do Comércio (OMC)*, In: Barral, Welber (Ed.), *Tribunais internacionais: mecanismos contemporâneos de solução de controvérsias*, Florianópolis, 2004. pp. 53-54.

¹⁰⁹⁶ Weiler, 2000, p. 3.

¹⁰⁹⁷ Weiler, 2000, p. 3-4.

¹⁰⁹⁸ Weiler, 2000, p. 7.

of law, it will continue to be possible to interpret and implement this principle in different ways due to the different existing legal traditions. In the case of the WTO, nevertheless, establishing and enforcing a particular conception of rule of law may be easier than one may presume. This is because the WTO is not tied to any particular national legal tradition and its legal culture can be improved. As I have already argued in Chapter I, rule of law has to benefit the well-being of persons, because the well-being of persons is the ultimate end of the law. Besides, as I have also already argued, courts and judges rather than the legislative and executive branches of national governments are likely to be the most important actors in this move towards a more effective protection of private parties rather than political interests among countries. I believe that the same understanding should apply for WTO law and the DSB decisions.

The WTO is a market making institution, it is very strong and highly politicised. Concerning these aspects, *Mavroidis* explains that compliance with WTO norms is often:

“a mere façade for alternate politically motivated stratagem owing to the ‘incentive to behave opportunistically’ and members have little incentive to disclose the information pertaining to negotiated settlements.”¹⁰⁹⁹

Still with regard to compliance and compensation, the same author highlights some key aspects:

“Generally at least three prerequisites have to be fulfilled prior to seeking compliance: (i) A complaint has to be introduced; (ii) The award must be issued against the defendant; and (iii) The defendant must have modified the impugned policies or measures under attack. At this juncture it is essential to note that as per non-violation complaints, a WTO Member can be required to pay compensation even

¹⁰⁹⁹ Mavroidis, 2012, p. 2.

if the WTO Member committed no wrong, but owing to a legal action undertaken by it the value of the tariff concessions diminished.”¹¹⁰⁰

Mavroidis, nevertheless, calls attention to the fact that compliance could also occur in triggers in the political economy of the participants, ‘side effects’, ‘reputation costs’ and ‘credibility of the threat’ in the event of non-compliance,¹¹⁰¹ being a “quixotic exercise”¹¹⁰² to attempt a complex study on compliance due to the absence of information concerning to the reasons for compliance.¹¹⁰³

It must be noted that the rulings the WTO DSB are binding on its Members. Once a country or an organisation like the European Union becomes a WTO Member, it accepts the jurisdiction of the WTO DSB, and its international arbitral awards have binding effect upon its Members and generate responsibilities at the international level. Internal binding effect and implementation are questions of the specific domestic legal orders (the EU legal order in the case of the European Union) and continue to be controversial issues. Yet, if a WTO Member does not comply with a DSB ruling, it will fail to comply with an international obligation and will be subject to sanctions. This applies to all WTO Members. Every WTO Member commits itself before the international community to accept the ‘rules of the game’. Members also cannot ignore the WTO when a claim is made under the WTO treaty.

3. The differences between the dispute settlement systems of the WTO and the MERCOSUR both with respect to means as well as objectives

In this section, my aim is to present and describe the similarities and differences of the WTO and MERCOSUR dispute settlement mechanisms. I begin this comparative investigation with the similarities among both systems and, then, analyse the differences.

¹¹⁰⁰ *Ibid.*, p. 1. He also quoted Horn et al, *The WTO Dispute Settlement System (1995-2010): Some Descriptive Statistics*, in: *Journal of World Trade*, Nr. 45, pp. 1107-1138.

¹¹⁰¹ *Mavroidis*, 2012, p. 1.

¹¹⁰² *Ibid.*, p. 2.

¹¹⁰³ *Ibid.*

Both WTO and MERCOSUR dispute settlement mechanisms begin with a diplomatic phase for an amicable settlement. If there is no settlement (also known in the MERCOSUR as ‘negotiated solutions’), the next step is an assessment of the case under both factual and legal terms. While at the WTO this step is performed by a Panel with Panellists selected in an *Ad Hoc* manner, at the MERCOSUR it is done by an *Ad Hoc* arbitral tribunal.¹¹⁰⁴ Both in the WTO and MERCOSUR, rulings can be reviewed. While in the WTO this is a task for the Appellate Body, in the MERCOSUR it is a duty for the Permanent Court of Review (the ‘*Tribunal Permanente de Revisión*’) in Asunción, Paraguay. With regard to the arbitrators, at both the WTO Appellate Body and MERCOSUR Permanent Court of Review arbitrators are elected for a specific period of time,¹¹⁰⁵ but they do not need to reside either in Geneva or in Asunción, as they merely remain at disposal and meet only when disputes are brought.¹¹⁰⁶ Both dispute settlement mechanisms also allow the review of the implementation of decisions if prevailing parties consider the implementation inappropriate, besides the possibility for prevailing parties to impose retaliatory measures against losing parties.

With regard to the differences, while in the WTO retaliatory measures depend on DSB authorisation after Panel and Appellate Body reports have also been approved by the DSB (i.e., approved by all WTO Members through their representatives), in the MERCOSUR decisions delivered by its *Ad Hoc* arbitral tribunals and the Permanent Court of Review do not require approvals from other organs in order to be implemented. Also while the goal of the WTO agreements and its dispute settlement

¹¹⁰⁴ As explained in Chapter IV of this thesis, however, Mercosur Member States can take their disputes directly to the Permanent Court of Review. This possibility is foreseen in the Protocol of Olivos and depends on a common agreement between the claimant and the defendant. In such a situation, the Permanent Court of Review has the duties of a Mercosur ad hoc arbitral tribunal, but its decisions are unappealable.

The rules concerning the composition of the Mercosur *Ad Hoc* arbitral tribunals can be found in Art. 10 and Art. 11 of the Protocol of Olivos.

¹¹⁰⁵ The number and length of time for Appellate Body arbitrators and Permanent Court of Review arbitrators are different.

¹¹⁰⁶ The TPR shall be made up of five arbitrators. While each Member State shall appoint one arbitrator and an alternate for a term of two years renewable for a maximum of two consecutive terms, the fifth arbitrator shall be appointed for a non-renewable three-year term, unless otherwise agreed to by the Member States, and shall be chosen unanimously by the Member States at least three months before the end of the term of the previous fifth arbitrator in office. For more details, see Art. 18 of the Protocol of Olivos.

According to Art. 19 of the Protocol of Olivos, TPR judges must always be at the courts’ disposal from the time they are elected until the stipulated end of their term.

mechanism is the liberalisation of multilateral trade, the MERCOSUR agreements and its dispute settlement mechanism envisage more than only trade liberalisation, namely a regional integration whose main objectives conform to the objectives of the EC Treaty¹¹⁰⁷ and the legal consequences that these generate.¹¹⁰⁸ One may argue, as a result, that the differences concerning the aims of each organisation also influence members of Panels and the Appellate Body at the WTO and arbitrators of *Ad Hoc* arbitral tribunals and the Permanent Court of Review at the MERCOSUR, besides the outcomes of disputes at both organisations.

Furthermore, while at the WTO the members of Panels do not need to be legal experts (there is such a requirement only for Appellate Body members), at the MERCOSUR dispute settlement mechanism arbitrators at both *Ad Hoc* arbitral tribunals and the Permanent Court of Review are required to be. *Mavroidis* explains:

“there are no statutory requirements for legal expertise; the Panellists could thus be economists, historians, political scientists, and all that is required is expertise in international trade (Art. 8.1 DSU).”¹¹⁰⁹

The same author also stresses that members selected “will adjudicate even when the countries they originate from are parties”¹¹¹⁰ and “[t]his can be the case with respect to Panellists as well (Art. 8.3 DSU), although it has never happened in practice so far”.¹¹¹¹

With regard to the composition of the Appellate Body, *Petersmann* stresses that

¹¹⁰⁷ For more details, see Kraegel, Britta, *Der Abbau von Maßnahmen kontingentgleicher Wirkung als Instrument der Marktöffnung: Europäische Gemeinschaften und Mercosur im Vergleich*, München, 1997, p. 80; and Salomão Filho, Calixto/Samtleben, Jürgen, in: *Wertpapier-Mitteilungen (WM)*, 1992, Nr. 33, p. 1348.

¹¹⁰⁸ Perotti, Alejandro Daniel, *El Segundo Fallo Arbitral del Mercosur o el Amargo Despertar de Nuestro Sistema de Solución de Controversias*, in: *Revista de Derecho del Mercosur*, April 2000, Buenos Aires, p. 131 f. quoted in Pereira, Ana C. P., 2005, p. 15.

¹¹⁰⁹ Mavroidis, Petros C., *Justice is Coming (... From Behind Closed Doors: The WTO Judges)*, in: Cremona, Marise/Hilpold, Peter/Lavranos, Nikos/Staiger Schneider, Stefan/Ziegler, Andreas R. (Eds.), *Reflections on the Constitutionalisation of International Economic Law: Liber Amicorum for Ernst-Ulrich Petersmann*, Leiden/Boston, Brill, 2014, p. 245.

¹¹¹⁰ *Ibid.*, p. 247.

¹¹¹¹ *Ibid.*

“The composition of the standing Appellate Body by legal experts appointed for a 4-year term reflects the concern that the *ad hoc* selection, for a single case, of GATT and WTO panel members, most of which have no prior dispute settlement experience in national and international trade law, can endanger the legal consistency of the complex WTO system.”¹¹¹²

As *Petersmann* has pointed out (citation above), the current composition of Panels represents a danger to the legal consistency of the WTO system. Therefore, there is no feasible reasoning as to why Panel members do not have to be legal experts and one may assume that, if they were legal experts and had prior dispute settlement experience either in national or better yet in international trade law, the number of appeals to the Appellate Body, which is the second and highest instance in the WTO dispute settlement mechanism, could be reduced, as Panel rulings would be more consistent with WTO law, and parties could have fewer costs. This brings me to *Nordström* and *Shaffer*, as they explain that under the current dispute settlement system it can take up to three years to settle a dispute and can cost more than half a million dollars in legal fees, as well as requiring significant time commitments from a bureaucracy that may already be severely under-resourced.¹¹¹³

With regard to the Appellate Body selection process, *Mavroidis* stresses the following:

“The AB’s selection process is better organized. Still, we know very little about the criteria for selecting one over another candidate and (some of us) are still looking for explanations why some candidates with notorious expertise in the field have been discarded while others with much less expertise have been preferred.”¹¹¹⁴

¹¹¹² Petersmann, Ernst-Ulrich, *How to promote the international rule of law? Contributions by the World Trade Organization Appellate Body Review System*, in: *Journal of International Economic Law*, Nr. 1, 1998, p. 39.

¹¹¹³ Nordström, Håkan/Shaffer, Gregory, *Access to Justice in the World Trade Organization: The Case for a Small Claims Procedure – a Preliminary Analysis*, ICTSD Dispute Settlement and Legal Aspects of International Trade Issue Paper Nr. 2, International Centre for Trade and Sustainable Development, Geneva, 2007, p. 1.

¹¹¹⁴ Mavroidis, 2014, p. 248.

Mavroidis also points out that after the year 2000 there was “a shift towards diplomats (bureaucrats)”¹¹¹⁵ in the selection of Appellate Body members “in the sense that the AB is now more than ever composed of them and the committee selecting them has increasingly been interviewing bureaucrats over the years”.¹¹¹⁶ Among the consequences of this shift is the sacrifice of consistency in the reasoning, which will depend “on who is at the receiving end”,¹¹¹⁷ as “[w]hat is acceptable in Seoul may be unacceptable in Brussels or Washington, DC”.¹¹¹⁸

While both the WTO and the MERCOSUR have democratic deficits in their decision-making processes, the MERCOSUR has some aspects that provide more legitimization of MERCOSUR law. Firstly, while meetings of the Common Market Council take place twice a year, heads of the MERCOSUR Member States meet only once a year.¹¹¹⁹ Secondly, the MERCOSUR has the PARLASUR, which is a Parliament that is being developed and is, at its current stage, already more advanced than the Parliamentary Conference on the WTO. Art. 1 of the MERCOSUR Parliament’s constitutive protocol clearly defines the PARLASUR as an organ for the representation of the peoples of the MERCOSUR that is independent and autonomous, and integrates the MERCOSUR institutional structure.¹¹²⁰ The constitutive protocol implicitly recognises, as a consequence, deficiencies regarding democracy which need to be corrected. While it is true that the PARLASUR is not yet

¹¹¹⁵ *Ibid.* The author also quotes Elsig, Manfred/Pollack, Mark A., *Agents, Trustees and International Courts: The Politics of Judicial Appointment at the World Trade Organization*, in: *European Journal of International Relations* published online on 5th September 2012.

¹¹¹⁶ *Ibid.*

¹¹¹⁷ *Ibid.*, p. 249.

¹¹¹⁸ *Ibid.*

¹¹¹⁹ Bonzon, Yves, *Options for Public Participation in the WTO: Experience from Regional Trade Agreements*, in: Steger, Debra P. (Ed.), *Redisigning the World Trade Organization for the twenty-first century*, Ottawa, The Centre for International Governance Innovation (CIGI) and Wilfrid Laurier University Press, 2010, p. 292.

¹¹²⁰ Art. 1 of the constitutive protocol:

Constitución

Constituir el Parlamento del MERCOSUR, en adelante el Parlamento, como órgano de representación de sus pueblos, independiente y autónomo, que integrará la estructura institucional del MERCOSUR.

El Parlamento sustituirá a la Comisión Parlamentaria Conjunta.

El Parlamento estará integrado por representantes electos por sufragio universal, directo y secreto, de acuerdo con la legislación interna de cada Estado Parte y las disposiciones del presente Protocolo.

El Parlamento será un órgano unicameral y sus principios, competencias e integración se rigen según lo dispuesto en este Protocolo.

La efectiva instalación del Parlamento tendrá lugar, a más tardar, el 31 de diciembre de 2006.

La constitución del Parlamento se realizará a través de las etapas previstas en las Disposiciones Transitorias del presente Protocolo.

a real Parliament, one can clearly see that a Parliament is taking shape. The WTO, nevertheless, completely excludes civil society, institutions like parliaments and congresses, and has no organ that is similar to the PARLASUR.¹¹²¹ Even though some WTO decisions exert impacts on individuals and these impacts are similar to the impacts exerted by decisions taken by States at the national level, the WTO continues to be strongly State-centred.¹¹²²

4. Brazil and the WTO

Every WTO Member has the freedom to decide its national trade regulation in constitutional and legislative terms. This is a matter of sovereignty, the WTO respects this sovereignty and, as a consequence, trade regulation and commitments concerning market access differ among countries. Also the DSB has already made reference to this freedom. One example is *Korea – Beef*, in which the Appellate Body manifested the following:

“It is not open to doubt that Members of the WTO have the right to determine for themselves the level of enforcement of their WTO-consistent laws and regulations. We note that this has also been recognized by the panel in *United States – Section 337*, where it said: “The Panel wished to make it clear that this [the obligation to choose a reasonably available GATT-consistent or less inconsistent measure] does not mean that a contracting party could be asked to change its substantive patent law or its desired level of enforcement of that law (...).”¹¹²³

¹¹²¹ The creation of a WTO parliamentary body has, nevertheless, already been discussed in legal articles by some experts. See e.g. Mann, Erik, *A Parliamentary Dimension to the WTO – More Than Just a Vision?!*, in: *Journal of International Economic Law*, Vol. 7, Nr. 3, 2004, pp. 659-665; Shaffer, Gregory, *Parliamentary Oversight of WTO Rule-Making: The Political, Normative, and Practical Contents*, in: *Journal of International Economic Law*, Vol. 7, Nr. 3, 2004, pp. 629-654; and Skaggs, David E., *How Can Parliamentary Participation in WTO Rule-Making and Democratic Control be Made More Effective in the WTO? A United States Congressional Perspective*, in: *Journal of International Economic Law*, Vol. 7, Nr. 3, 2004, pp. 655-658.

¹¹²² Similarly, Bonzon, 2010, pp. 288-289.

¹¹²³ *Korea – Beef (AB)*, paragraph 176.

Brazil has been a Member of the WTO since its creation. The Uruguay Round agreements, which include the constitutive act of the WTO, have been in force in Brazil since 31st December 1994. This was made possible through the presidential decree Nr. 1,355 of 30th December 1994, which sanctioned the legislative decree Nr. 30 of 15th December 1994.¹¹²⁴ As a Member of this organisation, Brazil has had to adapt its domestic law in order to not have rules that are contrary to WTO provisions. One must note that, as a WTO Member, Brazil can be and, actually, has been a party to various Panels established before the DSB, whose decisions the country has to accept.

While the Panels have features of arbitral tribunals but are not, the Appellate Body is more like court but is not. Without entering into the details of the *sui generis* character of the DSB,¹¹²⁵ it has to be emphasised that its rulings cannot be regarded in Brazil as foreign judgments, but as international arbitral awards. While foreign judgments are those that are delivered by courts that are subject to the sovereignty of a particular State and presuppose a foreign law subject to the jurisdiction of that State, international arbitral awards must be delivered by an international court or an international arbitral tribunal or body with jurisdiction over its Members.¹¹²⁶ If the decisions of the WTO DSB would be considered and treated as foreign judgments, they would have to be governed by the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. This is not the case. Furthermore, until Decree Nr. 4,311 was published on 24th July 2002 in the Brazilian official gazette and entered into force to finally regulate the mentioned convention, law Nr. 9,307 of 1996 required that all foreign judgments had to go through a procedure of homologation at the STF in order to become valid within Brazil. One has to agree that it would be illogical to consider the decisions of the WTO DSB as

¹¹²⁴ For more details, visit the Website of the Brazilian Ministry of Foreign Affairs at www.mre.gov.br.

¹¹²⁵ There is plenty of literature on the topic. Some examples are Palmetier, David/Mavroidis, Petros C., *Dispute settlement in the World Trade Organization: practice and procedure*, 2nd ed., New York, Cambridge University Press, 2004; Mavroidis, Petros C., *The law of the World Trade Organization (WTO): documents, cases & analysis*, 2nd ed., St. Paul, MN, West, 2013; Matsushita, Mitsuo/Schoenbaum, Thomas/Mavroidis, Petros, *The World Trade Organization: law and practice*, 2nd ed., Oxford and New York, Oxford University Press, 2006; Bermann, George/Mavroidis, Petros C., *WTO law and developing countries*, Cambridge (England) and New York, Cambridge University Press, 2007.

¹¹²⁶ For details, see Mazzuoli, Valério de O., *As sentenças proferidas por tribunais internacionais devem ser homologadas pelo Supremo Tribunal Federal?*, In: Boletim Meridiano 47, Vol. 3, Nr. 28-29, 2002, p. 22 f., available at <http://seer.bce.unb.br/index.php/MED/article/viewArticle/4428>. Date of access: 14th March 2013.

foreign judgments and make their validity within Brazil subject to an homologation procedure at the country's highest court of justice, as Brazil is a WTO Member and, as such, recognises the jurisdiction of the DSB of the WTO, which is an international organisation rather than a State and, as consequence, passes international arbitral awards rather than foreign judgments.

With reference to substantive law, as long as the provisions of a treaty are self-executing and the treaty has the status of federal law in Brazil, it confers rights directly upon private parties. In the case of the GATT, it has been internalised in Brazil by the Legislative Decree Nr. 30 of 15th December 1994, which approved the final act of the GATT Uruguay Round of Multilateral Trade Negotiations. Furthermore, two decisions of the Federal Regional Court of the Second Region, which has jurisdiction over the States of Rio de Janeiro and Espírito Santo, considered GATT provisions self-executing¹¹²⁷⁻¹¹²⁸ and, as such, can confer rights upon private parties before Brazilian administrative authorities.¹¹²⁹

At WTO level, Brazil's preparation for disputes entails close links with the national private sector and law firms of inland and abroad, which are generally financed by the domestic industry. On some opportunities, the industry's interests have not coincided with the perception of public interest of the General Coordination of Disputes (CGC) of the Brazilian Ministry of Foreign Affairs, and the latter has prevailed to decide the tactic.¹¹³⁰

¹¹²⁷ Tribunal Regional Federal da Segunda Região, *Apelação em Mandado de Segurança* ('Appeal in writ of mandamus') 96.02.17384-0/ES, judgment of 17th June 1997. The case was about a specific national tax exemption for imported goods (for details, see annex III of the Decree Nr. 7,722 of 1975). But, for this section of the thesis, the most important part of the court's decision was written in the majority opinion by Judge Silvério Cabral. He mentioned Art. 98 of the National Tax Code and sustained the prevalence of international law norms over domestic law. Here is the text of Art. 98 of the Brazilian Tax Code: "*Os tratados e as convenções internacionais revogam ou modificam a legislação tributária interna, e serão observados pela que lhes sobrevenha.*"

¹¹²⁸ Tribunal Regional Federal da Segunda Região, *Apelação em Mandado de Segurança* ('Appeal in writ of mandamus') 89.02.11872-0/RJ, judgment of 21st November 1990.

¹¹²⁹ Marques, Claudia L./Lixinski, Lucas, p. 167.

¹¹³⁰ Barral, Welber, *The Brazilian Experience in Dispute Settlement*, in: *United Nations Economic Commission for Latin America and the Caribbean (ECLAC) – Project Documents Collection*, Santiago, 2007, p. 41, to be found at www.eclac.org/comercio/publicaciones/xml/6/32116/The_Brazilian_Experience_in_Dispute_Settlement_LCW147.pdf. Date of access: 24th August 2010.

With regard to the fulfilment of WTO obligations, there is a limited number of cases in which Brazil has been the respondent.¹¹³¹ *Barral* explains that this number of cases might be considered insufficient to identify a definite tendency, but, with the exception of *Brazil-Aircraft*, cases were complied within a considerably short period of time and mainly through changes in administrative regulations, especially in the cases in which a negotiated agreement was achieved.¹¹³²

According to *Schaffer et al.*,¹¹³³ Brazil is (among the developing countries) the leading example for adapting national strategies to the challenges of the legalised and judicialised WTO regime.¹¹³⁴

4.1. Case law at national level

This section presents in subsection “a” *Súmulas*¹¹³⁵ and in subsection “b” some court decisions of Brazil’s highest judicial instance for non-constitutional matters: the Superior Tribunal de Justiça¹¹³⁶ (STJ). The aim is to illustrate legal practice.

a. *Súmulas* of the STJ concerning the GATT

Súmula 20 – A mercadoria importada de país signatário do GATT é isenta do ICM quando contemplado com esse favor o similar nacional.

DJ Data: 07.12.1990 PG: 14682

REPDJ Data: 13.12.1990 PG: 15022

RSTJ Vol.: 00016 PG: 00515

RT Vol.: 00662 PG: 00167

¹¹³¹ There are 14 cases, according to the WTO webpage on Brazil, which can be found at www.wto.org/english/thewto_e/countries_e/brazil_e.htm. Date of access: 24th August 2010. Brazil was also complainant in 25 cases and a third party in 60 cases.

¹¹³² *Barral*, Welber, 2007, p. 48.

¹¹³³ Shaffer, Gregory/Ratton, Michelle/Rosenberg, Barbara, *Brazil’s Response to the Judicialized WTO Regime: Strengthening the State through Diffusing Expertise*, São Paulo, 2006, p. 3, to be found at www.ictsd.org/downloads/2008/06/brazil_paper1.pdf. Date of access: 14th March 2013.

¹¹³⁴ For the details on the Brazilian national and foreign trade regulation, please consult the section entitled ‘National and Foreign Trade Regulation’ in Chapter III of this thesis.

¹¹³⁵ For a definition, please consult the subsection entitled ‘*Súmulas*’ in Chapter III of this thesis.

¹¹³⁶ ‘Superior Court of Justice’, in English.

Súmula 71 – O bacalhau importado de país signatário do GATT é isento de ICM.

DJ Data: 04.02.1993 PG: 00775

RSTJ Vol.: 00044 PG: 00323

RT Vol.: 00696 PG: 00212

Súmula 124 – A taxa de melhoramento dos portos tem base em cálculo diverso do imposto de importação, sendo legítima a sua cobrança sobre a importação de mercadorias de países signatários do GATT, da ALALC ou ALADI.

DJ Data: 15.12.1994 PG: 34815

RSTJ Vol.: 00072 PG: 00139

RT Vol.: 00712 PG: 00252

The approximate number of STJ decisions involving the *Súmulas* above in the period from 1995 and 2006 is 459 rulings.¹¹³⁷

b. A selection of STJ rulings:

Ruling a: Recurso Especial – RESP 187135/RS:

Data do Julgamento: 17.04.2001

Ementa: Tributário – ICMS – Isenção – Importação de Sementes – Similar Nacional – GATT – Art. 98 do Código Tributário Nacional.

- 1. A guia de importação não constitui prova suficiente de similaridade com produto nacional.*
- 2. Para a concessão dos benefícios do GATT é necessário a prova de similaridade, por meio de atestado emitido pelo Conselho de Política Aduaneira, nos termos da legislação pertinente (Decreto-Lei 37/66, Decreto Nr. 91.030/85 e Decreto Nr. 61.574/67).*
- 3. Precedentes jurisprudenciais.*

¹¹³⁷ Mercadante, Araminta de A. (Ed.), *Consolidação das Normas do GATT 47, GATT 94 e OMC – Legislação Brasileira*, São Paulo, 2007, p. 542.

4. *Recurso provido.*

Ruling b: Recurso Especial – RESP 130670/SP:

Data do Julgamento: 02.10.2001

Ementa: Tributário – Imposto de Importação – Vitamina “E” – Derivados – GATT – Aliquota Zero.

1. *A importação da vitamina – “E”, assim como de seus derivados, recebem o benefício de alíquota zero, conforme está contemplado no Acordo Geral de Tarifas Aduaneiras e Comércio – GATT.*
2. *Prevalência do acordo do GATT sobre a legislação tributária superveniente (art. 98 do CTN).*
3. *Precedentes deste Tribunal.*
4. *Recurso especial improvido.*

Ruling c: Recurso Especial – RESP 316255/SP:

Data do Julgamento: 20.11.2001

Ementa: Tributário – ICMS sobre o Salmão – Convênio 60/91 – Súmula 71 – Isenção.

1. *O salmão, quando importado in natura sem sofrer processo de industrialização, pela autorização contida no convênio 60/91, está isento de ICMS.*
2. *O salmão, assim como o bacalhau e a merluza, oriundo do país signatário do antigo GATT, hoje OMC, goza do benefício fiscal.*
3. *Recurso especial improvido.*

Ruling d: Agravo Regimental no Agravo de Instrumento – AgRg no AG 527233/SP

Data do Julgamento: 20.11.2003

Ementa: Processual Civil e Tributário – Agravo Regimental – Importação de Erva Doce (in natura) – Isenção de ICMS – Acordo GATT – Súmulas números 20 do STJ e 525 do STF – Precedentes.

- 1. Agravo regimental contra decisão que negou provimento ao agravo de instrumento da parte agravante para manter a isenção de ICMS para importação de erva doce oriunda de país signatário do acordo GATT.*
- 2. É cediço que os Tratados e Convenções Internacionais são de extrema importância na área fiscal, sendo exemplo disto o Acordo Geral sobre Tarifas e Aduaneiras e Comércio – GATT.*
- 3. As Súmulas N^{os} 20/STJ e 575/STF enunciam, respectivamente, que: “A mercadoria importada de país signatário do GATT é isenta do ICM, quando contemplado com esse favor o similar nacional” e “A mercadoria importada do país signatário do GATT ou membro da ALALC estende-se à isenção do ICM concedida a similar nacional.”*
- 4. Em consequência, a erva doce (in natura), importada de país signatário do GATT para comercialização, sem sofrer nenhum processo de industrialização, encontra-se isenta de ICMS, em virtude de existir similar nacional também isento. Precedentes desta Corte.*
- 5. A isenção do tributo beneficia a erva doce, sem outras especificações pretendidas pela recorrente. Não há que se negar tal natureza ao produto em sementes, por estar ele em estado natural, motivo suficiente para se conceder a isenção almejada.*
- 6. Precedentes desta Corte Superior.*
- 7. Agravo regimental não provido.*

Ruling e: Agravo Regimental no Agravo de Instrumento – AgRg no AG 449535/SP

Data do Julgamento: 09.12.2003

Ementa: Processo Civil e Tributário – Mandado de Segurança – ICMS – Isenção – Importação de Bacalhau – GATT – Art. 98 do Código Tributário Nacional – Fundamentos não Atacados – Reexame de Provas – Súmulas 7, 182, 71/STJ.

- 1. Isento o pescado nacional do recolhimento de ICMS, igual tratamento deve ser dado ao bacalhau proveniente de país signatário do GATT, por força do acordo firmado entre seus membros, sob pena de violação ao Art. 98 do CTN. Precedentes.*
- 2. O bacalhau importado de país signatário do GATT é isento de ICMS Súmula 71/STJ.*
- 3. “É inviável o agravo do art. 545 do CPC que deixa de atacar os fundamentos da decisão agravada” Súmula 182/STJ.*
- 4. “A pretensão de simples reexame de prova não enseja recurso especial” Súmula 7/STJ.*
- 5. Agravo improvido.*

Ruling f: Agravo Regimental no Agravo de Instrumento – AgRg no AG 336548/SP

Data do Julgamento: 09/03/2004

Ementa: Tributário – Agravo Regimental – Agravo de Instrumento – AFRMM – Isenção – Não é válido o Acordo do GATT – Precedentes.

- a. A jurisprudência desta Corte firmou o entendimento de que a isenção do Adicional ao Frete para Renovação da Marinha Mercante – AFRMM depende da existência de ato internacional, de natureza contratual, firmado pelo Brasil concedendo o*

benefício à mercadoria importada, não valendo, para tanto, acordo genérico como o GATT.

b. Agravo regimental a que se nega provimento.

Ruling g: Recurso Especial – RESP 617499/SP

Data do Julgamento: 15.04.2004

Ementa: Tributário – Salmão – Importação – ICMS – País signatário do GATT – Isenção.

- 1. A cláusula do tratado internacional estabelece tratamento igualitário (não mais favorável) entre produtos similares dos países signatários. Mercê de ser inconfundível o salmão importado com eventual similar nacional, o que por si só afasta a ratio essendi do ato legislativo transnacional, o suposto pescado interno não goza de benefício mais favorável, por isso que descabe o favor fiscal pretendido.*
- 2. Deveras, o órgão competente nacional (IBAMA) atestou a existência em águas marítimas nacionais de pescado similar ao salmão. Consequentemente, impõe-se verificar o tratamento intra muros concedido ao mesmo, no afã de respeitar o tratado internacional.*
- 3. A cláusula do tratado subsume-se à regra interna quanto à sua implementação, por isso que faz depender o tratamento isonômico-fiscal daquilo que dispuser a norma tributária do país signatário.*
- 4. Havendo similar nacional em confronto com o salmão importado e que não goza de isenção, benefício esse, de interpretação estrita, não há como se conferir a alforria fiscal.*
- 5. Interpretação literal que se impõe na defesa da ordem tributária (art. 111, CTN) e do produto nacional. Precedentes da Corte.*
- 6. Recurso especial a que se nega provimento.*

Ruling h: Recurso Especial – RESP 426945/PR

Data do Julgamento: 22.06.2004

Ementa: Tributário – Regime Internacional – Dupla Tributação – IRRPF – Impedimento – Acordo GATT – Brasil e Suécia – Dividendos enviados a Sócio Residente no Exterior – Arts. 98 do CTN, 2º da Lei 4.131/62 e 3º do GATT.

- 1. Os direitos fundamentais globalizados, atualmente, estão sempre no caminho do impedimento da dupla tributação. Esta vem sendo condenada por princípios que estão acima até da própria norma constitucional.*
- 2. O Brasil adota para o capital estrangeiro um regime de equiparação de tratamento (art. 2º da Lei 4.131/62, recepcionado pelo art. 172 da CF), legalmente reconhecido no art. 150, II, da CF, que, embora se dirija, de modo explícito, à ordem interna, também é dirigido às relações externas.*
- 3. O art. 98 do CTN permite a distinção entre os chamados tratados-contratos e os tratados-leis. Toda a construção a respeito da prevalência da norma interna com o poder de revogar os tratados, equiparando-os à legislação ordinária, foi feita tendo em vista os designados tratados, contratos, e não os tratados-leis.*
- 4. Sendo o princípio da não-discriminação tributária adotado na ordem interna, deve ser adotado também na ordem internacional, sob pena de desvalorizarmos as relações internacionais e a melhor convivência entre os países.*
- 5. Supremacia do princípio da não-discriminação do regime internacional tributário e do art. 3º do GATT.*
- 6. Recurso especial provido.*

Ruling i: Recurso Especial – RESP 628360/PE

Data do Julgamento: 17.08.2004

Ementa: Tributário – ICMS – Importação de Merluza – Isenção – Acordo Geral de Tarifas e Comércio – GATT – Convênio Interestadual 60/91 – Benefício Não Concedido ao Produto Importado – Inexistência de Qualquer dos Vícios Art. 535 do CPC – Rediscussão de Questões de Mérito – Impossibilidade.

- a. Evidencia-se, nas razões dos embargos, a intenção da embargante de ver reaberta a discussão das questões de mérito decididas no acórdão, finalidade que não se coaduna com a disciplina dos embargos de declaração.*
- b. O Acordo Geral de Tarifas e Comércio – GATT prevê que os produtos importados de país signatário gozarão de tratamento não menos favorável que o concedido a produtos similares do país importador. Segundo o Convênio Interestadual 60/91, a merluza não goza da isenção de ICMS concedida às operações internas com pescado. Portanto, inexistindo para a merluza nacional o benefício em questão, não há base jurídica para atribuir tal favor ao produto importado.*
- c. Recurso especial a que se nega provimento.*

Ruling j: Recurso Especial – RESP 696713/RS

Data do Julgamento: 14.12.2004

Ementa: Tributário – ICMS – Produtos que Compõem a Cesta Básica do Rio Grande do Sul – Redução da Base de Cálculo nos Limites do Estado – Inexistência do Benefício para as Operações Interestaduais – Extensão para as Importações – Impossibilidade.

- 1. Não se pode interpretar o GATT de maneira a conferir ao produto importado tratamento mais vantajoso do que o dispensado ao nacional.*

2. *Os produtos que compõem a cesta básica do Rio Grande do Sul só gozam de redução da base de cálculo nos limites do Estado. Não havendo previsão do benefício para as operações interestaduais, não cabe estendê-lo às importações.*
3. *Recurso especial provido.*

Ruling k: Recurso Especial – RESP 642663/RS

Data do Julgamento: 14.12.2004

Ementa: Tributário – ICMS – Isenção – Importação de Leite de País Integrante da OMC (Signatário do Antigo GATT) – Possibilidade – Lei Estadual Isencional.

1. *Pretensão de insenção de ICMS concedida ao leite pelo Estado com competência para fazê-la.*
2. *“Embora o ICMS seja tributo de competência dos Estados e do Distrito Federal, é lícito à União, por tratado ou convenção internacional, garantir que o produto estrangeiro tenha a mesma tributação do similar nacional. Como os tratados internacionais têm força de lei federal, nem os regulamentos do ICMS nem os convênios interestaduais têm poder para revogá-los. Colocadas essas premissas, verifica-se que a Súmula 575 do Supremo Tribunal Federal, bem como as Súmulas 20 e 71 do Superior Tribunal de Justiça continuam com plena força.” (AgRg no AG n.º 438.449/RJ, Rel. Min. Fanciuilli Netto, DJ de 07.04.2003)*
3. *Deveras, a Súmula n.º 71/STJ (“o bacalhau importado de país signatário do GATT é isento de ICM”) confirma a possibilidade de, em sede de Tratado Internacional, operar-se o benefício fiscal concedido por qualquer Estado da federação, desde que ocorrente o fato isentivo em unidade federada na qual se encarte a hipótese prevista no diploma multinacional.*
4. *O Decreto n.º 37.699/97, do Estado do Rio Grande do Sul, isenta de ICMS o leite fluido, pasteurizado ou não, esterilizado ou reidratado,*

por isso que se estende o mesmo benefício ao leite importado da Argentina e do Uruguai e comercializado nesta unidade da federação.

5. *Não se revela razoável a exigência de prova de similaridade para atestar a equiparação de “leite” a “leite”, em virtude da notoriedade desta semelhança. Precedente desta corte: RESP 511231/RS, Relator Ministro João Otávio de Noronha, DJ de 19/12/2003).*
6. *Recuso especial desprovido.*

5. Access to justice in the WTO

As explained in Chapter I, access to justice is an essential human right that constitutes the right of persons to access courts of law, have their cases heard in balanced proceedings – which guarantee a legal defence, adversarial systems and lawfully appointed judges – and are adjudicated in accordance with substantive standards of fairness and justice.¹¹³⁸ However, given that the WTO dispute settlement system is open only to States and customs territories that have full autonomy to conduct trade policies, direct access for private parties at the WTO is not possible. Private actors cannot, as a consequence, sue and there are no damages awards. It can be argued in addition that direct access for private parties at WTO level is never likely to become possible, because the WTO represents billions of people worldwide.

Stoll calls attention to the fact that:

“it has been widely accepted that the international trade system can promote development by opening up markets [*footnote omitted*]. In this perspective, it is a grave concern that, for instance, neither businesses from developing countries nor traders within the EU have a legal remedy when members of the WTO do not live up to their commitments.”¹¹³⁹

¹¹³⁸ For more details on this definition, please refer to Chapter 1.

¹¹³⁹ Stoll, 2014, p. 209.

The same author also points out the differences between ‘traders’ and ‘investors’ regarding the enforcement of international legal commitments as follows:

“In contrast to the weak position of traders with regard to the enforcement of international legal commitments, investors enjoy strong and effective protection with regard to the right to property and fair treatment on the basis of bilateral investment treaties and investment arbitration, including a direct right to compensation.”¹¹⁴⁰

On the other hand, WTO law does prescribe protection of individual access to justice in the legal orders of WTO Members.¹¹⁴¹ Hence, in order to achieve an appropriate examination with regard to access to justice in WTO law matters rather than simply access to justice in the WTO, the following two subsections of this thesis, ‘Access to Justice for WTO Members’ and ‘Access to Justice for Private Parties’, perform the respective studies. The methodology applied is again normative and descriptive. The result is a balance of theoretical considerations and practical problems.

5.1. Access to Justice for WTO Members

In legal systems, while on the one hand every substantive standard has procedural instruments available at its service, on the other hand judicial rulings and their enforcements often reveal deficiencies in terms of efficacy of access to justice. This is one of the problems at the WTO. Even when the significance of ‘suprapositive law’ (i.e., law beyond WTO statutory law like the human rights obligations of all UN Member States and principles of justice) is explicit, the DSB avoids sentencing in a way that links its decision to the notion of justice. The Committee on International Trade Law of the International Law Association, however, recalls that:

“the WTO Agreement and its dispute settlement rules aim at providing security and predictability to the multilateral trading system through guarantees of ‘access to justice’ both at the international level as well

¹¹⁴⁰ *Ibid.*, p. 210.

¹¹⁴¹ For the examples, see the next section of this chapter: ‘Access to Justice for Private Parties’.

as within domestic legal systems, and require each WTO Member to ‘ensure the conformity of its laws, regulations and administrative procedures’ with WTO law (Article XVI:4 WTO Agreement).”¹¹⁴²

One can conclude that the paragraph quoted above makes reference to Art. 3 DSU in the part “providing security and predictability to the multilateral trading system”,¹¹⁴³ that the guarantees of ‘access to justice’ at the international level are to be protected by the WTO Panel, Appellate Body and arbitration procedures, and that the protection within domestic legal systems is to be performed for private persons by domestic courts. Moreover, it is worth emphasising that who in fact is responsible for producing the goods and creating the services that are internationally traded are private persons rather than diplomats and other representatives of governments.¹¹⁴⁴ Hence, the decisions of WTO arbitrators should mainly favour private persons and, therefore, communities rather than primarily the interests of governments.

The WTO juridical systematic must have a suprapositive legal tool that is capable of repealing unjust laws, namely those WTO rules and norms that strictly follow conventional methods of legal control.¹¹⁴⁵ As explained in the section ‘Access to Justice as a Human Right’ of Chapter I, the DSB can apply *lex naturalis* and one can also argue that the DSB has no pre-established barriers to apply *lex naturalis*.

Concerning access to the WTO dispute settlement mechanism, even though there is an Advisory Centre on WTO Law (ACWL) that provides free legal advice and has “promoted ‘procedural justice’ in WTO dispute settlement proceedings”,¹¹⁴⁶ the WTO is not a free forum for all its Members due to its rising costs over time, voluminous

¹¹⁴² Paragraph 6 of the Resolution 4/2014 of the Committee on International Trade Law of the International Law Association passed at the 76th Conference of the International Law Association, which took place from 7th to 11th April 2014 in Washington/DC, United States.

¹¹⁴³ Art. 3 (2) DSU: “The dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system. The Members recognize that it serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law. Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements.”

¹¹⁴⁴ For a specific analysis on access to justice for private persons, see the next section of this chapter, ‘Access to Justice for Private Parties’.

¹¹⁴⁵ I.e., ‘unjust laws’ in the broadest sense of the expression within WTO law.

¹¹⁴⁶ The expression is used on page 25 of the eleventh revised draft report of the International Trade Law Committee of the International Law Association (Washington Conference 2014).

protocols and a necessary high degree of legal expertise to be a claimant and defendant at Panel and Appellate Body levels. Concerning the ACWL, it is worth underlining that it provides free legal advice only to ‘least-developed countries’ designated as such by the United Nations.¹¹⁴⁷ ‘Least-developed country’ is a classification below ‘developing country’. Among the current 159 WTO Members, there are 33 least-developed countries – in addition, there are also 10 countries in the process of acceding to the WTO that can already benefit from the free legal advice provided by the ACWL.¹¹⁴⁸ In practice, however, least-developed countries are not major players in international trade and do not use the WTO dispute settlement mechanism as often as developing countries, emerging countries and developed countries. Hence, it can be concluded that the WTO is a free forum only for least-developed countries and WTO Members who can pay for all the involved costs.

With specific regard to access to justice, the WTO has no particular standard of review for cases dealing with public goods. Furthermore, instead of binding precedents, the WTO has *de facto* precedents.¹¹⁴⁹ It is worth reiterating, however, that access to justice is also a global public good. As a result, all States should promote it at all organisations that they are Members of through their representatives, including diplomats, since they have responsibilities towards society. Moreover, international organisations and globalisation created interdependencies that demand minimum standards of public goods protection. So, with respect to Panel and Appellate Body rulings, the most efficient way to promote access to justice seems to be through consistent interpretation with due respect to human rights and basic freedoms, and the

¹¹⁴⁷ According to the UN Office of the High Representative for the Least Developed Countries, Landlocked Developing Countries and Small Island Developing States (<http://unohrrls.org/about-ldcs/criteria-for-ldcs/>), for a country to be considered least-developed, it must fulfil the following criteria:

1. *Low-income criterion*, based on a three-year average estimate of GNI per capita, based on the World Bank Atlas method (under US\$ 992 for inclusion, above US\$ 1,190 for graduation as applied in the 2012 triennial review).
2. *Human Assets Index (HAI)* based on indicators of: (a) nutrition: percentage of population undernourished; (b) health: mortality rate for children aged five years or under; (c) education: the gross secondary school enrolment ratio; and (d) adult literacy rate.
3. *Economic Vulnerability Index (EVI)* based on indicators of: (a) population size; (b) remoteness; (c) merchandise export concentration; (d) share of agriculture, forestry and fisheries in gross domestic product; (e) share of population living in low elevated coastal zones; (f) instability of exports of goods and services; (g) victims of natural disasters; and (h) instability of agricultural production.

¹¹⁴⁸ For details, visit the official website of the Advisory Centre on WTO Law at the address http://www.acwl.ch/e/ld_countries/ld_countries.html. Date of access: 8th April 2014.

¹¹⁴⁹ Personal notes taken at a seminar on WTO law conducted by Professor Petros C. Mavroidis in the autumn of 2011 at the European University Institute in Florence, Italy.

development of an international rule of law for the benefit of peoples. Even though new WTO precedents will still be officially not binding, a sort of ‘new legal culture’ at the WTO dispute settlement mechanism can bring progress. The new precedents also have the potential of being taken into consideration in similar future cases again and again. No binding effect is unimportant if Panel and Appellate Body arbitrators have a legal culture for the benefit of the well-being of citizens rather than political interests among countries. In the end, the well-being of citizens is the ultimate end of the law. The creation of a ‘new legal culture’ among WTO arbitrators may be easier than one may presume because the WTO is not tied to any particular national legal tradition and its legal culture can be improved through consistent interpretation in conformity with the human rights obligations of governments as defined in the preamble and in Art. 31 of the VCLT. Such an important shift is essentially a matter of willingness and coherence for the benefit of citizens.

It also has to be stressed that the WTO dispute settlement mechanism tends to follow an instrumental rationality that usually does not regard individuals as such but considers them objects (in the sense that human beings tend to be ‘transformed’ into things, i.e. objectified) so that the economic plans of WTO Members and companies can be successful. The rights of governments, however, will always have priority over the rights of companies, because parties at the WTO dispute settlement mechanism are only WTO Members, and their interests obviously prevail. With some exceptions, it can also be argued that WTO arbitrators firstly analyse the legal logic of the cases and only secondly reflect on the social effects of their decisions (if they reflect at all). It has to be said, however, that there were at Appellate Body level some important rulings concerning a broader interpretation of WTO law – i.e., WTO law as part of the ‘rest’ of international law. It is worth citing on this respect part of the ruling of *United States – Standards for Reformulated Gasoline*:

“[I]t is increasingly clear to all that international trade law is, in fact, a part of the broader overall realm of “international law.” Through the years, some have seen the law of the GATT, and now the law of the WTO, as somehow self-contained in the world of “widgets” that was for so long the seemingly separate province of those who dealt with GATT law and GATT lore. Yet our brief experience with the WTO

has clearly shown that the work of the WTO cannot be seen as separate and apart from all that is not directly related to trade in “widgets.” And it follows, likewise, that WTO law cannot be considered as separate and apart from other international law. As we said in the very first ruling of the WTO Appellate Body, WTO rules cannot be viewed in “clinical isolation” from the broader corpus and the broader concerns of the rest of international law.”¹¹⁵⁰

It can be argued that one of the objectives of the dispute settlement body of the WTO is to discipline WTO Members. The key issues are the terms by which the disciplining is being performed, what goals are currently pursued and what has to be changed.

Another aspect to worry about concerning access to justice in the WTO is that it is quite acceptable that a person may be an arbitrator in one case and be a counselor on one side in another pending case with similar legal issues. Therefore, the arguments to decide the first case as an arbitrator may be used in the other case in which the same person is a counselor on one side. Furthermore, the identities of Panellists reveal that the overwhelming majority of them are delegates in Geneva. Hence, one can conclude that a delegate serving as Panel Member is obviously going to think about the potential repercussions of the outcome to his own country and, as a result, is going to work in the way that is best for the interests of his country, especially if the person in question has a career in international administration. These circumstances raise several serious questions and one of them is the following: is this Panellist going to act independently and impartially apply the law? The answer is clear, definitely not. This is because this Panellist is clearly either controlled, manipulated or influenced by governmental branches and is not free of external pressure. All these aspects are negative for the WTO because they harm its authority, respect and legitimacy. Although a Panel is not a court and a Panellist is not a judge, they do perform the duties of a court and a judge, respectively. Therefore, Panellists have to behave like lawful judges and Panel cases have to be adjudicated in accordance with substantive standards of fairness and justice.

¹¹⁵⁰ *United States – Standards for Reformulated Gasoline*, WTO Doc. WT/DS2/AB/R, at 17 (20th March 1996).

Re-examining or rather understanding the meaning of access to justice at the DSB of the WTO will generate a battle of diverging positions, and diplomats who defend Westphalian policies are likely to be the angriest. Furthermore, as I have already argued in the subsection named ‘Market Freedom’ of Chapter II, Panel and Appellate Body members as well as WTO legal experts should bear in mind that the cases brought to the WTO dispute settlement mechanism do not simply involve the interest of WTO Members but also implicitly the interests, the rights and the future of the Members’ peoples.

5.2. Access to Justice for Private Parties

Something is sometimes in front of our eyes and we simply do not realise that it is there. It is precisely because of this context that, similarly to what has been done in section 2 of Chapter I, every legal article mentioned next in this section has a footnote presenting its original legal text. Some of the articles are long, but they need to be presented in full in order to leave no open questions on the matter.

Even though individuals have economic rights like the right to property, the right to trade and the right to market access, and although goods and services are produced, traded and consumed by private persons, the individuals’ right of access to justice *vis-à-vis* the law of the WTO is repeatedly disregarded even at the domestic level of WTO Members. Among the reasons for this treatment is the fact that most national lawyers as well as national judiciaries are completely unfamiliar with WTO law.

As I have mentioned above in this thesis, WTO law does prescribe protection of individual access to justice in the legal orders of WTO Members. This is the case of Art. X of the GATT,¹¹⁵¹ Art. 13 of the WTO Anti-Dumping Agreement,¹¹⁵² Art. 11 of

¹¹⁵¹ “Article X: Publication and Administration of Trade Regulations

1. Laws, regulations, judicial decisions and administrative rulings of general application, made effective by any contracting party, pertaining to the classification or the valuation of products for customs purposes, or to rates of duty, taxes or other charges, or to requirements, restrictions or prohibitions on imports or exports or on the transfer of payments therefor, or affecting their sale, distribution, transportation, insurance, warehousing inspection, exhibition, processing, mixing or other use, shall be published promptly in such a manner as to enable governments and traders to become acquainted with them. Agreements affecting international trade policy which are in force between the government or a governmental agency of any contracting party and the government or governmental

the WTO Agreement on Customs Valuation,¹¹⁵³ Art. 4 of the Agreement on Pre-Shipment Inspection,¹¹⁵⁴ Art. 23 of the Agreement on Subsidies and Countervailing

agency of any other contracting party shall also be published. The provisions of this paragraph shall not require any contracting party to disclose confidential information which would impede law enforcement or otherwise be contrary to the public interest or would prejudice the legitimate commercial interests of particular enterprises, public or private.

2. No measure of general application taken by any contracting party effecting an advance in a rate of duty or other charge on imports under an established and uniform practice, or imposing a new or more burdensome requirement, restriction or prohibition on imports, or on the transfer of payments therefor, shall be enforced before such measure has been officially published.

3. (a) Each contracting party shall administer in a uniform, impartial and reasonable manner all its laws, regulations, decisions and rulings of the kind described in paragraph 1 of this Article.

(b) Each contracting party shall maintain, or institute as soon as practicable, judicial, arbitral or administrative tribunals or procedures for the purpose, *inter alia*, of the prompt review and correction of administrative action relating to customs matters. Such tribunals or procedures shall be independent of the agencies entrusted with administrative enforcement and their decisions shall be implemented by, and shall govern the practice of, such agencies unless an appeal is lodged with a court or tribunal of superior jurisdiction within the time prescribed for appeals to be lodged by importers; *Provided* that the central administration of such agency may take steps to obtain a review of the matter in another proceeding if there is good cause to believe that the decision is inconsistent with established principles of law or the actual facts.

(c) The provisions of subparagraph (b) of this paragraph shall not require the elimination or substitution of procedures in force in the territory of a contracting party on the date of this Agreement which in fact provide for an objective and impartial review of administrative action even though such procedures are not fully or formally independent of the agencies entrusted with administrative enforcement. Any contracting party employing such procedures shall, upon request, furnish the CONTRACTING PARTIES with full information thereon in order that they may determine whether such procedures conform to the requirements of this subparagraph.”

¹¹⁵² “Article 13 – Judicial Review:

Each Member whose national legislation contains provisions on anti-dumping measures shall maintain judicial, arbitral or administrative tribunals or procedures for the purpose, *inter alia*, of the prompt review of administrative actions relating to final determinations and reviews of determinations within the meaning of Article 11. Such tribunals or procedures shall be independent of the authorities responsible for the determination or review in question.

Each Member whose national legislation contains provisions on anti-dumping measures shall maintain judicial, arbitral or administrative tribunals or procedures for the purpose, *inter alia*, of the prompt review of administrative actions relating to final determinations and reviews of determinations within the meaning of Article 11. Such tribunals or procedures shall be independent of the authorities responsible for the determination or review in question.”

¹¹⁵³ “Article 11

1. The legislation of each Member shall provide in regard to a determination of customs value for the right of appeal, without penalty, by the importer or any other person liable for the payment of the duty.

2. An initial right of appeal without penalty may be to an authority within the customs administration or to an independent body, but the legislation of each Member shall provide for the right of appeal without penalty to a judicial authority.

3. Notice of the decision on appeal shall be given to the appellant and the reasons for such decision shall be provided in writing. The appellant shall also be informed of any rights of further appeal.”

¹¹⁵⁴ “Article 4: Independent Review Procedures

Members shall encourage preshipment inspection entities and exporters mutually to resolve their disputes. However, two working days after submission of the grievance in accordance with the provisions of paragraph 21 of Article 2, either party may refer the dispute to independent review. Members shall take such reasonable measures as may be available to them to ensure that the following procedures are established and maintained to this end:

(a) these procedures shall be administered by an independent entity constituted jointly by an organization representing preshipment inspection entities and an organization representing exporters for the purposes of this Agreement;

(b) the independent entity referred to in subparagraph (a) shall establish a list of experts as follows:

Measures,¹¹⁵⁵ Art. VI of the GATS,¹¹⁵⁶ Articles 41 to 50 of the Agreement on Trade-Related Intellectual Property Rights¹¹⁵⁷ and Art. XX of the Agreement on

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- (i) a section of members nominated by an organization representing preshipment inspection entities;
 - (ii) a section of members nominated by an organization representing exporters;
 - (iii) a section of independent trade experts, nominated by the independent entity referred to in subparagraph (a).

The geographical distribution of the experts on this list shall be such as to enable any disputes raised under these procedures to be dealt with expeditiously. This list shall be drawn up within two months of the entry into force of the WTO Agreement and shall be updated annually. The list shall be publicly available. It shall be notified to the Secretariat and circulated to all Members;

(c) an exporter or preshipment inspection entity wishing to raise a dispute shall contact the independent entity referred to in subparagraph (a) and request the formation of a panel. The independent entity shall be responsible for establishing a panel. This panel shall consist of three members. The members of the panel shall be chosen so as to avoid unnecessary costs and delays. The first member shall be chosen from section (i) of the above list by the preshipment inspection entity concerned, provided that this member is not affiliated to that entity. The second member shall be chosen from section (ii) of the above list by the exporter concerned, provided that this member is not affiliated to that exporter. The third member shall be chosen from section (iii) of the above list by the independent entity referred to in subparagraph (a). No objections shall be made to any independent trade expert drawn from section (iii) of the above list;

(d) the independent trade expert drawn from section (iii) of the above list shall serve as the chairman of the panel. The independent trade expert shall take the necessary decisions to ensure an expeditious settlement of the dispute by the panel, for instance, whether the facts of the case require the panelists to meet and, if so, where such a meeting shall take place, taking into account the site of the inspection in question;

(e) if the parties to the dispute so agree, one independent trade expert could be selected from section (iii) of the above list by the independent entity referred to in subparagraph (a) to review the dispute in question. This expert shall take the necessary decisions to ensure an expeditious settlement of the dispute, for instance taking into account the site of the inspection in question;

(f) the object of the review shall be to establish whether, in the course of the inspection in dispute, the parties to the dispute have complied with the provisions of this Agreement. The procedures shall be expeditious and provide the opportunity for both parties to present their views in person or in writing;

(g) decisions by a three-member panel shall be taken by majority vote. The decision on the dispute shall be rendered within eight working days of the request for independent review and be communicated to the parties to the dispute. This time-limit could be extended upon agreement by the parties to the dispute. The panel or independent trade expert shall apportion the costs, based on the merits of the case;

(h) the decision of the panel shall be binding upon the preshipment inspection entity and the exporter which are parties to the dispute.”

¹¹⁵⁵ “Article 23: Judicial Review

Each Member whose national legislation contains provisions on countervailing duty measures shall maintain judicial, arbitral or administrative tribunals or procedures for the purpose, *inter alia*, of the prompt review of administrative actions relating to final determinations and reviews of determinations within the meaning of Article 21. Such tribunals or procedures shall be independent of the authorities responsible for the determination or review in question, and shall provide all interested parties who participated in the administrative proceeding and are directly and individually affected by the administrative actions with access to review.”

¹¹⁵⁶ “Article VI: Domestic Regulation

1. In sectors where specific commitments are undertaken, each Member shall ensure that all measures of general application affecting trade in services are administered in a reasonable, objective and impartial manner.

2. (a) Each Member shall maintain or institute as soon as practicable judicial, arbitral or administrative tribunals or procedures which provide, at the request of an affected service supplier, for the prompt review of, and where justified, appropriate remedies for, administrative decisions affecting trade in services. Where such procedures are not independent of the agency entrusted with the administrative decision concerned, the Member shall ensure that the procedures in fact provide for an objective and impartial review.

(b) The provisions of subparagraph (a) shall not be construed to require a Member to institute such tribunals or procedures where this would be inconsistent with its constitutional structure or the nature of its legal system.

3. Where authorization is required for the supply of a service on which a specific commitment has been made, the competent authorities of a Member shall, within a reasonable period of time after the submission of an application considered complete under domestic laws and regulations, inform the applicant of the decision concerning the application. At the request of the applicant, the competent authorities of the Member shall provide, without undue delay, information concerning the status of the application.

4. With a view to ensuring that measures relating to qualification requirements and procedures, technical standards and licensing requirements do not constitute unnecessary barriers to trade in services, the Council for Trade in Services shall, through appropriate bodies it may establish, develop any necessary disciplines. Such disciplines shall aim to ensure that such requirements are, *inter alia*:

(a) based on objective and transparent criteria, such as competence and the ability to supply the service;

(b) not more burdensome than necessary to ensure the quality of the service;

(c) in the case of licensing procedures, not in themselves a restriction on the supply of the service.

5. (a) In sectors in which a Member has undertaken specific commitments, pending the entry into force of disciplines developed in these sectors pursuant to paragraph 4, the Member shall not apply licensing and qualification requirements and technical standards that nullify or impair such specific commitments in a manner which:

(i) does not comply with the criteria outlined in subparagraphs 4(a), (b) or (c); and

(ii) could not reasonably have been expected of that Member at the time the specific commitments in those sectors were made.

(b) In determining whether a Member is in conformity with the obligation under paragraph 5(a), account shall be taken of international standards of relevant international organizations⁽³⁾ applied by that Member.

6. In sectors where specific commitments regarding professional services are undertaken, each Member shall provide for adequate procedures to verify the competence of professionals of any other Member.”

¹¹⁵⁷ “SECTION 1: GENERAL OBLIGATIONS

Article 41

1. Members shall ensure that enforcement procedures as specified in this Part are available under their law so as to permit effective action against any act of infringement of intellectual property rights covered by this Agreement, including expeditious remedies to prevent infringements and remedies which constitute a deterrent to further infringements. These procedures shall be applied in such a manner as to avoid the creation of barriers to legitimate trade and to provide for safeguards against their abuse.

2. Procedures concerning the enforcement of intellectual property rights shall be fair and equitable. They shall not be unnecessarily complicated or costly, or entail unreasonable time-limits or unwarranted delays.

3. Decisions on the merits of a case shall preferably be in writing and reasoned. They shall be made available at least to the parties to the proceeding without undue delay. Decisions on the merits of a case shall be based only on evidence in respect of which parties were offered the opportunity to be heard.

4. Parties to a proceeding shall have an opportunity for review by a judicial authority of final administrative decisions and, subject to jurisdictional provisions in a Member's law concerning the importance of a case, of at least the legal aspects of initial judicial decisions on the merits of a case. However, there shall be no obligation to provide an opportunity for review of acquittals in criminal cases.

5. It is understood that this Part does not create any obligation to put in place a judicial system for the enforcement of intellectual property rights distinct from that for the enforcement of law in general, nor does it affect the capacity of Members to enforce their law in general. Nothing in this Part creates any obligation with respect to the distribution of resources as between enforcement of intellectual property rights and the enforcement of law in general.

SECTION 2: CIVIL AND ADMINISTRATIVE PROCEDURES AND REMEDIES

Article 42

Fair and Equitable Procedures

Members shall make available to right holders (for the purpose of this Part, the term "right holder" includes federations and associations having legal standing to assert such rights) civil judicial procedures concerning the enforcement of any intellectual property right covered by this Agreement. Defendants shall have the right to written notice which is timely and contains sufficient detail,

including the basis of the claims. Parties shall be allowed to be represented by independent legal counsel, and procedures shall not impose overly burdensome requirements concerning mandatory personal appearances. All parties to such procedures shall be duly entitled to substantiate their claims and to present all relevant evidence. The procedure shall provide a means to identify and protect confidential information, unless this would be contrary to existing constitutional requirements.

Article 43

Evidence

1. The judicial authorities shall have the authority, where a party has presented reasonably available evidence sufficient to support its claims and has specified evidence relevant to substantiation of its claims which lies in the control of the opposing party, to order that this evidence be produced by the opposing party, subject in appropriate cases to conditions which ensure the protection of confidential information.

2. In cases in which a party to a proceeding voluntarily and without good reason refuses access to, or otherwise does not provide necessary information within a reasonable period, or significantly impedes a procedure relating to an enforcement action, a Member may accord judicial authorities the authority to make preliminary and final determinations, affirmative or negative, on the basis of the information presented to them, including the complaint or the allegation presented by the party adversely affected by the denial of access to information, subject to providing the parties an opportunity to be heard on the allegations or evidence.

Article 44

Injunctions

1. The judicial authorities shall have the authority to order a party to desist from an infringement, *inter alia* to prevent the entry into the channels of commerce in their jurisdiction of imported goods that involve the infringement of an intellectual property right, immediately after customs clearance of such goods. Members are not obliged to accord such authority in respect of protected subject matter acquired or ordered by a person prior to knowing or having reasonable grounds to know that dealing in such subject matter would entail the infringement of an intellectual property right.

2. Notwithstanding the other provisions of this Part and provided that the provisions of Part II specifically addressing use by governments, or by third parties authorized by a government, without the authorization of the right holder are complied with, Members may limit the remedies available against such use to payment of remuneration in accordance with subparagraph (h) of Article 31. In other cases, the remedies under this Part shall apply or, where these remedies are inconsistent with a Member's law, declaratory judgments and adequate compensation shall be available.

Article 45

Damages

1. The judicial authorities shall have the authority to order the infringer to pay the right holder damages adequate to compensate for the injury the right holder has suffered because of an infringement of that person's intellectual property right by an infringer who knowingly, or with reasonable grounds to know, engaged in infringing activity.

2. The judicial authorities shall also have the authority to order the infringer to pay the right holder expenses, which may include appropriate attorney's fees. In appropriate cases, Members may authorize the judicial authorities to order recovery of profits and/or payment of pre-established damages even where the infringer did not knowingly, or with reasonable grounds to know, engage in infringing activity.

Article 46

Other Remedies

In order to create an effective deterrent to infringement, the judicial authorities shall have the authority to order that goods that they have found to be infringing be, without compensation of any sort, disposed of outside the channels of commerce in such a manner as to avoid any harm caused to the right holder, or, unless this would be contrary to existing constitutional requirements, destroyed. The judicial authorities shall also have the authority to order that materials and implements the predominant use of which has been in the creation of the infringing goods be, without compensation of any sort, disposed of outside the channels of commerce in such a manner as to minimize the risks of further infringements. In considering such requests, the need for proportionality between the seriousness of the infringement and the remedies ordered as well as the interests of third parties shall be taken into account. In regard to counterfeit trademark goods, the simple removal of the trademark unlawfully affixed shall not be sufficient, other than in exceptional cases, to permit release of the goods into the channels of commerce.

Article 47

Right of Information

Members may provide that the judicial authorities shall have the authority, unless this would be out of proportion to the seriousness of the infringement, to order the infringer to inform the right holder of the identity of third persons involved in the production and distribution of the infringing goods or services and of their channels of distribution.

Article 48

Indemnification of the Defendant

1. The judicial authorities shall have the authority to order a party at whose request measures were taken and who has abused enforcement procedures to provide to a party wrongfully enjoined or restrained adequate compensation for the injury suffered because of such abuse. The judicial authorities shall also have the authority to order the applicant to pay the defendant expenses, which may include appropriate attorney's fees.

2. In respect of the administration of any law pertaining to the protection or enforcement of intellectual property rights, Members shall only exempt both public authorities and officials from liability to appropriate remedial measures where actions are taken or intended in good faith in the course of the administration of that law.

Article 49

Administrative Procedures

To the extent that any civil remedy can be ordered as a result of administrative procedures on the merits of a case, such procedures shall conform to principles equivalent in substance to those set forth in this Section.

SECTION 3: PROVISIONAL MEASURES

Article 50

1. The judicial authorities shall have the authority to order prompt and effective provisional measures:

(a) to prevent an infringement of any intellectual property right from occurring, and in particular to prevent the entry into the channels of commerce in their jurisdiction of goods, including imported goods immediately after customs clearance;

(b) to preserve relevant evidence in regard to the alleged infringement.

2. The judicial authorities shall have the authority to adopt provisional measures *inaudita altera parte* where appropriate, in particular where any delay is likely to cause irreparable harm to the right holder, or where there is a demonstrable risk of evidence being destroyed.

3. The judicial authorities shall have the authority to require the applicant to provide any reasonably available evidence in order to satisfy themselves with a sufficient degree of certainty that the applicant is the right holder and that the applicant's right is being infringed or that such infringement is imminent, and to order the applicant to provide a security or equivalent assurance sufficient to protect the defendant and to prevent abuse.

4. Where provisional measures have been adopted *inaudita altera parte*, the parties affected shall be given notice, without delay after the execution of the measures at the latest. A review, including a right to be heard, shall take place upon request of the defendant with a view to deciding, within a reasonable period after the notification of the measures, whether these measures shall be modified, revoked or confirmed.

5. The applicant may be required to supply other information necessary for the identification of the goods concerned by the authority that will execute the provisional measures.

6. Without prejudice to paragraph 4, provisional measures taken on the basis of paragraphs 1 and 2 shall, upon request by the defendant, be revoked or otherwise cease to have effect, if proceedings leading to a decision on the merits of the case are not initiated within a reasonable period, to be determined by the judicial authority ordering the measures where a Member's law so permits or, in the absence of such a determination, not to exceed 20 working days or 31 calendar days, whichever is the longer.

7. Where the provisional measures are revoked or where they lapse due to any act or omission by the applicant, or where it is subsequently found that there has been no infringement or threat of infringement of an intellectual property right, the judicial authorities shall have the authority to order the applicant, upon request of the defendant, to provide the defendant appropriate compensation for any injury caused by these measures.

8. To the extent that any provisional measure can be ordered as a result of administrative procedures, such procedures shall conform to principles equivalent in substance to those set forth in this Section."

Government Procurement.¹¹⁵⁸ Therefore, private economic actors that are not entitled to have access to the WTO dispute settlement system can invoke WTO law at courts, tribunals and court-like bodies of the WTO Members. One can also clearly appreciate the importance of the role of judges and arbitrators, as the case may be, at the domestic legal systems of WTO Members in providing access to justice based on WTO law. They must, as a consequence, consistently interpret cases involving WTO law, namely by not disregarding WTO obligations, not disrespecting freedoms of trade beyond domestic borders and not ignoring principles of justice like the human rights obligations of all UN Member States (i.e., in accordance with Art. 31 and the preamble of the VCLT). An international rule of law depends not only on international organisations and the political will of governments, but also on the

¹¹⁵⁸ “Article XX: Challenge Procedures

Consultations

1. In the event of a complaint by a supplier that there has been a breach of this Agreement in the context of a procurement, each Party shall encourage the supplier to seek resolution of its complaint in consultation with the procuring entity. In such instances the procuring entity shall accord impartial and timely consideration to any such complaint, in a manner that is not prejudicial to obtaining corrective measures under the challenge system.

Challenge

2. Each Party shall provide non-discriminatory, timely, transparent and effective procedures enabling suppliers to challenge alleged breaches of the Agreement arising in the context of procurements in which they have, or have had, an interest.

3. Each Party shall provide its challenge procedures in writing and make them generally available.

4. Each Party shall ensure that documentation relating to all aspects of the process concerning procurements covered by this Agreement shall be retained for three years.

5. The interested supplier may be required to initiate a challenge procedure and notify the procuring entity within specified time-limits from the time when the basis of the complaint is known or reasonably should have been known, but in no case within a period of less than 10 days.

6. Challenges shall be heard by a court or by an impartial and independent review body with no interest in the outcome of the procurement and the members of which are secure from external influence during the term of appointment. A review body which is not a court shall either be subject to judicial review or shall have procedures which provide that:

- (a) participants can be heard before an opinion is given or a decision is reached;
- (b) participants can be represented and accompanied;
- (c) participants shall have access to all proceedings;
- (d) proceedings can take place in public;
- (e) opinions or decisions are given in writing with a statement describing the basis for the opinions or decisions;
- (f) witnesses can be presented;
- (g) documents are disclosed to the review body.

7. Challenge procedures shall provide for:

- (a) rapid interim measures to correct breaches of the Agreement and to preserve commercial opportunities. Such action may result in suspension of the procurement process. However, procedures may provide that overriding adverse consequences for the interests concerned, including the public interest, may be taken into account in deciding whether such measures should be applied. In such circumstances, just cause for not acting shall be provided in writing;
- (b) an assessment and a possibility for a decision on the justification of the challenge;
- (c) correction of the breach of the Agreement or compensation for the loss or damages suffered, which may be limited to costs for tender preparation or protest.

8. With a view to the preservation of the commercial and other interests involved, the challenge procedure shall normally be completed in a timely fashion.”

domestic judicial and public administrative agents responsible for interpreting and enforcing international rights and obligations that are for the benefit of citizens. In addition, domestic judicial agents as well as public administrative bodies also play an important role in maintaining security and predictability in the multilateral trading system.

Accordingly, private parties may make use of WTO law at the level of WTO Members. In the case of Brazil, similarly to what happens concerning MERCOSUR law and private parties, national courts play the most important role in the application of WTO law. It must be noted, nevertheless, that the WTO neither offers preliminary rulings like the Court of Justice of the European Union does, nor has anything similar to the *Opinión Consultiva* of the Permanent Court of Review of the MERCOSUR. In consequence, the MERCOSUR is in this aspect more advanced than the WTO.

As I have explained in the section of this chapter entitled ‘Brazil and the WTO’, as long as the provisions of a treaty are self-executing and the treaty has the status of federal law in Brazil, it confers rights directly upon private parties. Concerning the GATT, it has been internalised in Brazil and two court decisions considered GATT provisions as self-executing.^{1159 - 1160} Interestingly, one of these Brazilian court decisions dates back to 1990 – i.e., from a time before the creation of the WTO.

Similarly to MERCOSUR law at national courts, the interpretation and application of non-implemented WTO norms by national courts is a very important further step in the protection of the right of private persons to have access to justice. This brings back to the fore the importance of consistent interpretation. As I have explained in section 2 of Chapter I (i.e., the section entitled ‘Access to Justice as a Human Right’), consistent interpretation means the interpretation of national law in conformity with international obligations, and is expected to be performed by national judges besides administrative bodies, as they are able to connect the international to the national legal order and, as a result, really provide rule of law. A decision to be regarded as an example of consistent interpretation requires, in the words of *Nollkaemper*, that the

¹¹⁵⁹ Tribunal Regional Federal da Segunda Região, *Apelação em Mandado de Segurança* (‘Appeal in writ of mandamus’) 89.02.11872-0/RJ, judgment of 21st November 1990.

¹¹⁶⁰ Tribunal Regional Federal da Segunda Região, *Apelação em Mandado de Segurança* (‘Appeal in writ of mandamus’) 96.02.17384-0/ES, judgment of 17th June 1997.

court “considers a rule of international law in the interpretation or application of national law, and the outcome is consistent with both national and international law”.¹¹⁶¹ Furthermore, it can be argued that national judges must accept actions for damages from private parties against their own national governments due to any damage, loss, harm or injury caused by the non-implementation of specific WTO rules in the national law of their country.

6. The constitutionalisation of WTO law

It is widely accepted that treaties that set up international organisations can be called ‘constitutions’. This is because of the functions of these treaties, which are comparable to some of the functions performed by national constitutions. EU law, for instance, developed from international law and generated its own constitutional character rather than resulting from constitutional law. As has been argued in the section ‘Access to Justice as a Constitutional Right’ in Chapter I of this thesis, the international legal structure can be constitutionalised without de-constitutionalising national *Magna Cartas*, but rather complementing them like the EU experiences proved to be possible. With regard to the constitutional character of EU law, however, one must note that it was established after a long time marked, amongst other things, by numerous and strong calls in EU law scholarship.¹¹⁶²⁻¹¹⁶³ Moreover, as I defend in the section entitled ‘Constitutionalism’ of Chapter I, the Nation States’ legal systems do not need to be replaced but rather require effective mechanisms of both interdependence and interpenetration, an intergovernmental organisation like the WTO must recognise and respect the legitimacy of these mechanisms. With reference to interdependency and dispute settlements involving international trade issues, *Stoll* emphasises that:

¹¹⁶¹ Nollkaemper, p. 140.

¹¹⁶² See, e.g., Stein, Eric, *Lawyers, Judges, and the Making of a Transnational Constitution*, in: *American Journal of International Law*, Vol. 75, 1981, pp. 1-27; Weiler, Joseph H. H., *The Constitution of Europe: Do the New Clothes Have an Emperor? and Other Essays on European Integration*, Cambridge, Cambridge University Press, 1999; Craig, Paul P., *Constitutions, Constitutionalism, and the European Union*, in: *European Law Journal*, Vol. 7, Issue 2, 2001, pp. 125-150.

¹¹⁶³ This section of the thesis will also make reference to the authors who disagree with the constitutionalisation of WTO law and with comparisons between the constitutionalisation of EU law and a potential constitutionalisation of WTO law.

“the international trade system with its dispute settlement and enforcement system is becoming an important factor in international policymaking.”¹¹⁶⁴

The same author argues, on the other hand, that the current situation of fragmentation of international law, institutions, agencies, competencies and fora “hardly ever arises by accident”¹¹⁶⁵ and he implies that States deliberately accept it. Accordingly, if one agrees with *Stoll*’s standpoint, one may conclude that there is no reasonable mechanism of coordination in place at the international level because of a lack of interest among States. To put it more simply, there is power politics. However, it is worth highlighting again that it is nowadays acknowledged that the State is responsible for all its acts both *jure gestionis* and *jure imperii*, besides being also responsible for all its omissions.¹¹⁶⁶

As has been mentioned in the section ‘Constitutionalism’ of Chapter I, one of *Petersmann*’s proposals for the 21st century international economic law is a multilevel constitutionalism that:

“uses constitutional principles, rules and institutions at national and international levels of governance for the collective supply of international public goods, for instance by constituting and limiting international trade organizations with legislative, executive and judicial powers for protecting transnational rule of law among citizens.”¹¹⁶⁷

With specific regard to the analysis of the constitutionalisation of WTO law, I would like to begin by citing *Jackson*, as he summarises very well the resistance that exists among diplomats. *Jackson* explains that ‘constitutionalisation’ is:

¹¹⁶⁴ Stoll, 2014, p. 207.

¹¹⁶⁵ *Ibid.*, p. 208.

¹¹⁶⁶ Trindade, Antônio A. C., *International Law for Humankind: Towards a New Jus Gentium – General Course on Public International Law – Part I*, in: 316 *Recueil des Cours de l’Académie de Droit International de la Haye* (2005), ch. IX, pp. 256-257, quoted in Trindade, Antônio A. C., *The Access of Individuals to International Justice*, Oxford; New York, 2011, p. 2.

¹¹⁶⁷ Petersmann, Ernst-Ulrich, *International Economic Law in the 21st Century: Constitutional Pluralism and Multilevel Governance of Interdependent Public Goods* (Oxford and Portland, Oregon, Hart 2012), p. 141.

“a controversial word, when used in international relations, and indeed, the use of it in the context of institutions such as the WTO, has been criticized by diplomats and others who have a strong inclination to resist changes which involve departure from older ideas of ‘sovereignty’. Thus, to use the nomenclature ‘constitution’ for a treaty-based institutional structure is threatening.”¹¹⁶⁸

This brings back to the fore *Frowein* and his definition of the constitutionalisation of public international law. As I have written in the section ‘Access to Justice as a Constitutional Right’ in Chapter I, the author argues that the increased focus on the rights of individuals in a structure of international law that is going through transformations and has human rights lawyers at the forefront may be referred as the ‘constitutionalisation of public international law’.¹¹⁶⁹ It can be argued as a result of *Frowein*’s definition that the constitutionalisation of WTO law is part of that process of constitutionalisation, because WTO law is a field of public international law. *Cottier* and *Hertig* explain, while quoting *Schloemann* and *Ohlhoff*, that ‘constitutionalisation’ describes:

“the substantive reach of WTO law, the quasi-obligatory dispute settlement system and the shift of the WTO from a power to a rule oriented system, which has developed into a “proto-supranational structure”.”¹¹⁷⁰

I agree with *Charnovitz* when he sharply criticises the ‘orthopolitics’ (i.e., the participation of individuals in international policymaking only through governments)

¹¹⁶⁸ Jackson, John H., *General Editor’s Preface*, in: Cass, Deborah Z., *The constitutionalization of the World Trade Organization: legitimacy, democracy, and community in the international trading system*, New York, Oxford University Press, 2005, no page number.

¹¹⁶⁹ Frowein, Jochen A., *Konstitutionalisierung des Völkerrechts*, in: Dicke, Klaus/Hummer, Waldemar/ Girsberger, Daniel et al, (Ed.), *Public Law and Private International Law in a Globalising International System*, in: *Berichte der Deutschen Gesellschaft für Völkerrecht* 39 (2000), p. 438 et seq., quoted in Cottier/Hertig, p. 271.

¹¹⁷⁰ Schloemann, Hannes L./Ohlhoff, Stefan, “Constitutionalization” and Dispute Settlement in the WTO: National Security as an Issue of Competence, in: *The American Journal of International Law*, Vol. 93, Nr. 2 (April, 1999), p. 424 et seq., quoted in Cottier/Hertig, 2003, p. 272.

that exists at the WTO, and support what he defines as ‘cosmopolitics’ – that is to say, legitimate and democratic governance at all levels.¹¹⁷¹

With regard to the multilevel trade governance relationship (‘bilevel trade governance relationship’, one could also say) between the WTO and the WTO Members from a constitutional point of view, it is worth making reference to *Bonzon*, who explains that:

“the procedural requirements imposed on Members by Article X of the General Agreement on Tariffs and Trade (GATT 1947), Article III of the General Agreement on Trade in Services (GATS), and Article 63 of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) relating to their domestic decision-making procedures, should be imposed on international decision-making, which would amount to recognizing the existence of constitutional principles at the WTO level.”¹¹⁷²

There are, nevertheless, numerous authors that are against the constitutionalisation of WTO law. *Howse* and *Nicolaides*, for instance, consider constitutionalising WTO law as going too far, as such a constitutionalisation has the potential of impeding WTO Members “from pursuing legitimate policy goals domestically, and overstrains the international system”.¹¹⁷³ And *Weiler* considers “‘constitutionalizing’ the GATT in structural terms and in some ways using the EU as a ‘model’ simplistic dream”.¹¹⁷⁴ Nevertheless, a key issue to be taken into consideration by those in favour as well as those against the constitutionalisation of WTO law is the degree of constitutionalisation that they have in mind. One may even believe that there is a lack

¹¹⁷¹ Charnovitz, Steve, *WTO Cosmopolitics*, in: *New York University Journal of International Law and Politics*, Vol. 34, 2002, pp. 306 and 310, quoted in Cottier/Hertig, p. 273.

¹¹⁷² Bonzon, 2010, p. 290. He also cites Charnovitz, Steve, *Transparency and Participation in the World Trade Organization*, in: *Rutgers Law Review*, Vol. 56, 2004, pp. 942-944.

¹¹⁷³ Howse, Robert/Nicolaides, Kalypso, *Legitimacy in Global Governance: Why Constitutionalizing the WTO is a Step Too Far*, in: Porter, Roger B./Sauve, Pierre/Subramanian, Arvind/Zampetti, Beviglia (Eds.), *Efficiency, equity and legitimacy: the multilateral trading system at the millenium*, Washington, Brookings Institution Press, 2001, pp. 227 et seq., quoted in Cottier/Hertig, p. 274.

¹¹⁷⁴ Weiler, Joseph H. H., *Epilogue: Towards a Common Law of International Trade*, in: Weiler, Joseph H. H. (Ed.), *The EU, the WTO and the NAFTA: Towards a Common Law of International Trade*, Oxford/New York, Oxford University Press, 2000, p. 230, quoted in Cottier/Hertig, pp. 274-275.

of communication and understanding among the authors with regard to the matter. Indeed, *Cottier* and *Hertig* define that a “relation of mutual communication” is what describes the prospects of 21st century constitutionalism.¹¹⁷⁵ As has been explained in the section ‘Constitutionalism’ of Chapter I of this thesis, “constitutionalism of the 21st century needs to break “the statist frame” and to escape ‘all or nothing’ propositions”¹¹⁷⁶ in order to take “a necessary step to secure the values of constitutionalism in an era of globalization and interdependence”¹¹⁷⁷ and “discipline the power of the emerging non-state polities by law”.¹¹⁷⁸ This brings back to the fore *Jackson*, as he defends the need to treat certain types of treaties as ‘constitutional treaties’. A treaty to be considered ‘constitutional’ should have, according to the author, a “relatively large number of members such as the 193 of the UN, 153 of the WTO, etc.”,¹¹⁷⁹⁻¹¹⁸⁰ “maybe some with special attributes would have only a dozen members, but mostly the CT would be most needed to have the CT term characteristics if its membership is large enough to likely cause “treaty rigidity””,¹¹⁸¹⁻¹¹⁸² be “designed with a purpose and goal to have a long-term duration”,¹¹⁸³ have “ancillary institutional structure to reasonably allow amendments”,¹¹⁸⁴ have “institutions to resolve disputes of treaty clause interpretation and to allocate power and decision making processes”,¹¹⁸⁵ and “should be endowed with the institutional structure and resources to be relatively assured to be able to carry out the goals and mandates of the total institution”.¹¹⁸⁶

Concerning case law, *Jackson* explains that the Appellate Body has already clarified items of Art. 31 and Art. 32 of the Vienna Convention on the Law of Treaties. He

¹¹⁷⁵ Cottier/Hertig, p. 328.

¹¹⁷⁶ Cottier/Hertig, p. 297. For the expression “the statist frame”, the authors quoted Walker, Neil, *The EU and the WTO: Constitutionalism in a New Key*, in: de Búrca, Grainne/Scott, Joanne (Eds.), *The EU and the WTO: Legal and Constitutional Issues*, Oxford (England)/Portland (Oregon), Hart, 2001 p. 39.

¹¹⁷⁷ Cottier/Hertig, p. 297.

¹¹⁷⁸ *Ibid.*, p. 297.

¹¹⁷⁹ Jackson, John H., *Constitutional Treaties: Institutional Necessity and Challenge to International Law Fundamentals*, in: Cremona, Marise/Hilpold, Peter/Lavranos, Nikos/Staiger Schneider, Stefan/Ziegler, Andreas R. (Eds.), *Reflections on the Constitutionalisation of International Economic Law: Liber Amicorum for Ernst-Ulrich Petersmann*, Leiden/Boston, Brill, 2014, p. 195.

¹¹⁸⁰ The numbers of UN and WTO members have been informed by the author.

¹¹⁸¹ *Ibid.*

¹¹⁸² The author uses the term ‘CT’ for ‘Constitutional Treaty’.

¹¹⁸³ Jackson, 2014, p. 195.

¹¹⁸⁴ *Ibid.*

¹¹⁸⁵ *Ibid.*

¹¹⁸⁶ *Ibid.*

emphasises 6 techniques of treaty interpretation applied by the Appellate Body, namely: (1) evolutionary interpretations, (2) purposive (or teleological) interpretations, (3) balancing policy goals, (4) *in dubio mitius*, (5) *effet utile*, and (6) precedents.¹¹⁸⁷ For the purposes of a constitutionalisation of WTO law, one may argue that ‘evolutional interpretations’ and ‘purposive (or teleological) interpretations’ are the most important ones. The *Shrimp-Turtle* case¹¹⁸⁸ is pointed out by *Jackson* as a case in which the Appellate Body applied ‘evolutional interpretations’ and the best case relating to what he describes as “WTO text interpretation and the “constitutional” developments in general”,¹¹⁸⁹ because the Appellate Body concluded that older interpretations of some WTO text were inappropriate to the particular facts of the case and for solving its problems.¹¹⁹⁰ The Appellate Body also ruled that many circumstances had developed over time and the strict view of the WTO text would not be just, and explained that it was applying an evolutionary approach in the *Shrimp-Turtle* case.¹¹⁹¹ The ‘purposive (or teleological) interpretations’ approach is pointed out by *Jackson* as “one of the most important interpretative activities for a “Constitutional Treaty”.”¹¹⁹² The author provides some clarifications on this type of interpretation that can be summarised as follows: while on the one hand *Jackson* clarifies that this is one of the most debated approaches to the interpretation of treaties in general, attracts strong opposing views and, in the case of the WTO and the GATT, created a belief that, if the Appellate Body and Panels apply it, they would go beyond their authorities, on the other hand the author argues that constitutional treaties have to adjust to changed circumstances in order to properly pursue the goals of their drafters, and entities (the WTO, for instance) should be treated as ongoing evolving entities, similarly to Nation State constitutional entities.¹¹⁹³

To conclude, by bearing in mind what *Stoll* explains about an economic constitution, i.e., that market economy and free trade are core elements of a ‘*Wirtschaftsverfassung*’ (‘economic constitution’, in English),¹¹⁹⁴ one may come to

¹¹⁸⁷ *Ibid.*, pp. 197-199.

¹¹⁸⁸ *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R. 6th November 1998.

¹¹⁸⁹ *Jackson*, 2014, p. 197.

¹¹⁹⁰ *Ibid.*

¹¹⁹¹ *Ibid.*

¹¹⁹² *Ibid.*, p. 198.

¹¹⁹³ *Ibid.*

¹¹⁹⁴ *Stoll*, 2014, p. 203.

the conclusion that the constitutionalisation of WTO law has the potential of allowing the WTO, which is responsible for governing the international trade of goods and services, to have competencies on some of the core characteristics of a ‘*Soziale Marktwirtschaft*’ (‘social market economy’). These competencies, which should also be performed and defended by the WTO DSB, would obviously have to include human rights and the provision of public goods, besides of course the regulation of trade and markets.¹¹⁹⁵ Such a constitutionalisation could protect essential guarantees of mankind, reduce or even close the existing gap between WTO law and other fields of international law and, as a consequence, create a new style of interpretation at the WTO DSB that is driven for individuals rather than governmental interests – thus contributing to both justice and access to justice at global level.

7. Multilevel case law

This section presents multilevel case law analyses with a particular attention to access to justice. The cases that I have selected for examination are the so-called *Brazil Tyres Cases* and *Poultry Disputes*. While the former are the only 3-layers examples of multilevel trade regulation – i.e., regional, global and national levels – involving a MERCOSUR Member State and are presented in subsection ‘6.1.’, the latter involve 2 layers, namely the regional and the global ones and are presented in subsection ‘6.2.’. Both series of cases are very appropriate to allow us to draw some of the several problems related to the administration of justice being faced by Brazilian, MERCOSUR and WTO judges. As to the structure of this section, the *Brazil Tyres Cases* and *Poultry Disputes* are each followed by subsections with concluding remarks.

7.1. *Brazil Tyres Cases*

Due to a ban on retreaded car tyres imposed by Brazil, two independent dispute settlement proceedings, one in each of the international organisations involved, were

¹¹⁹⁵ Similarly, Stoll, 2014, p. 203.

started. In the first case, Uruguay sought the instigation of proceedings against Brazil under the auspices of the MERCOSUR (*Uruguay v Brazil-Import prohibition of remoulded tyres from Uruguay* [9th January 2002]). The second case against Brazil was brought by the European Communities (EC) in the WTO (Panel Report *Brazil-Measures Affecting Imports of Retreated Tyres*, WTO case Nr. WT/DS332/R [12th June 2007], and Appellate Body Report *idem*, WTO case Nr. WT/DS332/AB/R [3rd December 2007]). The details are to be found below.

a. MERCOSUR Level

In August 2001, Uruguay resorted to the MERCOSUR mechanism for the settlement of disputes challenging the Brazilian law that prohibited the issue of import licences for remoulded tyres. Brazil had issued a ban on the import of used tyres before (*Portaria* DECEX 9/91)¹¹⁹⁶ and another law (*Portaria* SECEX 8/2000)¹¹⁹⁷ was issued to include remoulded tyres¹¹⁹⁸ in the concept of used tyres for the purposes of the former law. So, because Uruguay had been exporting remoulded tyres to Brazil, it alleged that the new *Portaria*¹¹⁹⁹ was a new constraint and contravened the MERCOSUR standstill prohibition on new restrictions to intra-regional flows. Brazil did not raise any environmental argument and based its entire defence on the claim that the new *Portaria* was of only an interpretative nature and could not be seen as a new restriction.

The legal debate in the MERCOSUR *Ad Hoc* tribunal was based on the evaluation of whether the new Brazilian *Portaria* represented a new restriction or whether it frustrated the legitimate expectations of Uruguay demanding the applicability of international law principles, such as *estoppel* (or *nemo potest venire contra factum proprium*). On 9th January 2002, the MERCOSUR *Ad Hoc* arbitral tribunal decided

¹¹⁹⁶ A Ministerial Act of the Department of Foreign Trade of the Brazilian Ministry of Development, Industry, and Foreign Trade.

¹¹⁹⁷ A Ministerial Act of the Secretariat of Foreign Trade of the Ministry of Development, Industry, and Foreign Trade.

¹¹⁹⁸ Remoulded tyres are a type of retreaded tyres, namely used tyres that have been through a special process that enables them to be used again. However, their useful life is shorter than that of new tyres.

¹¹⁹⁹ '*Portaria*' can be translated as 'administrative rule', 'ordinance' or 'regulation'. A *Portaria* is a binding internal administrative act under which heads of state departments issue special or general determinations to their subordinates.

that Brazil's ban was incompatible with a previous decision on trade restrictions and, consequently, Brazil amended its legislation to comply with the tribunal's findings.¹²⁰⁰⁻¹²⁰¹ Brazil did this on 8th March 2002 through *Portaria SECEX 02/2002* which created an exception to the previous *Portarias* and, in this way, abolished the ban on 'remoulded tyres'¹²⁰² imported from MERCOSUR countries (this exception was also maintained in *Portarias* SECEX 17/2003 and 14/2004). In this context, the MERCOSUR exception did not form part of preceding regulations prohibiting the import of remoulded tyres, notably *Portaria* SECEX 8/2000, but was introduced as a result of a ruling issued by an *Ad Hoc* arbitral tribunal. In 2004, this exception was incorporated into Art. 40 of *Portaria* SECEX 14/2004, which contains three main elements: (i) an import ban on retreaded tyres (the 'import ban'); (ii) an import ban on used tyres, and (iii) an exemption for remoulded tyres from MERCOSUR countries, which is referred to as the 'MERCOSUR exemption'.

However, regardless of the prohibitions of imports of used tyres¹²⁰³ through national regulations, Brazilian national courts continued to grant injunctions to national retreaders that sought judicial remedies against the prohibition. Hence, in September 2006, the Brazilian Government resorted to the Federal Supreme Court in order to stop these injunctions as they were supposed to contravene national environmental policy and the consequent national regulations.¹²⁰⁴

The European Communities (EC), nevertheless, resorted in June 2005 to the WTO mechanism for the settlement of disputes challenging the Brazilian restrictive measures (case Nr. WT/DS332/R), as Brazilian laws kept the restriction on the

¹²⁰⁰ Award of the *Ad Hoc* arbitral tribunal constituted to decide on the complaint made by the Oriental Republic of Uruguay to the Federative Republic of Brazil on the 'Import Ban of Remoulded Tyres from Uruguay', January 2002.

¹²⁰¹ This is because, according to the Protocol of Brasilia, once a decision was made by the three arbitrators forming the tribunal, it would be final and binding. No appeals were allowed because the Protocol of Olivos (which does allow appeals) was still being drafted. A party was only allowed to clarify the award within 15 days of its being made.

¹²⁰² It is the type of tyres that Uruguay was exporting and that is mentioned in the *Ad Hoc* arbitral tribunal decision.

¹²⁰³ But not retreaded tyres.

¹²⁰⁴ The main applicable law on the national environmental policy is the Brazilian Federal Constitution. For more details see the legal action brought by the Brazilian Government in the Federal Supreme Court: *Arguição de Descumprimento de Preceito Fundamental 101* (ADPF 101). It can be found at: www.stf.jus.br.

imports of used and retreaded tyres,¹²⁰⁵ but preserved an exemption to this rule concerning remoulded tyres from MERCOSUR countries.

b. WTO Level – Panel

The EC's main claims were that (1) the restrictions were of the quantitative type forbidden by the WTO rules and (2) the restrictions violated the most-favoured nation (MFN) and national treatment principles by distinguishing between Brazilian, MERCOSUR and other producers. To sum up, in the view of the EC, Brazil was acting contrary to GATT Articles I:1, III:4, XI:1, and XIII:1.

Brazil claimed that indeed the measure was restrictive, but raised the defence that the restrictions were necessary to protect its population's health and the country's environment.¹²⁰⁶ It justified the measure invoking GATT Art. XX (b) and (d)¹²⁰⁷ and justified the MERCOSUR exemption by Art. XXIV, because it was a measure adopted pursuant to Brazilian obligations under MERCOSUR.

The Panel accepted the Brazilian justification on grounds of environmental and health protection (GATT Art. XX (b) and (d)). However it considered that the injunctions

¹²⁰⁵ Retreaded tyres are tyres that have already been used and are no longer usable. Retreading tyres means reconditioning them and extending their lives. According to the United Nations Economic Commission for Europe (UNECE), the reconditioning process involves stripping the worn tread from a used tyre's skeleton and replacing it with new material in the form of a new tread and, sometimes, new material also covering parts or all of the sidewalls. For more details see UNECE Regulation numbers 1-9 (1998), 6.2.

¹²⁰⁶ Brazil's reason for the ban was dengue fever. It can lead to death and is transmitted by a certain species of mosquito (*Aedes aegypti*), which is found in tropical and subtropical countries. The mosquito breeds on stagnant water, found among other places inside the millions of waste tyres scattered throughout the country. It is a problem particularly affecting poor areas of developing countries, such as the Brazilian slums and small family farms. Following Brazil's continuous health crisis caused by mosquitoes carrying deadly tropical diseases, its legislative and executive branches decided to pass as many measures as possible to combat the problem. For more details see the panel report that is available at: www.wto.org.

¹²⁰⁷ Article XX, GATT:

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:

(b) necessary to protect human, animal or plant life or health;

(d) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement, including those relating to customs enforcement, the enforcement of monopolies operated under paragraph 4 of Article II and Article XVII, the protection of patents, trademarks and copyrights, and the prevention of deceptive practices.

granted by national courts were making the implementation of the measure incompatible with the GATT. Consequently, in order to bring the measure into line with the GATT, Brazil should also eliminate the possibility of imports of used tyres through the judicial authorisations. The MERCOSUR exemption was not censured as the panel considered that it was not an arbitrary decision, but only obedience to a MERCOSUR ruling¹²⁰⁸ and, moreover, because that exception caused a volume of imports that was not enough to undermine Brazil's chosen level of environmental protection.

Hence, even though Brazil had objectively lost the case, the measure was considered to be theoretically necessary and legitimate, and all Brazil had to do was to be more competent in implementing the measure. The EC was dissatisfied with some of the interpretations of the Panel and decided to appeal,¹²⁰⁹ being partly successful.

c. WTO Level – Appellate Body

The final conclusion was that the Brazilian import ban was necessary within the meaning of GATT Art. XX(b). Nevertheless the manner of application of the import ban adopted by Brazil did not satisfy the requirements of the *chapeau* of GATT Art. XX. The Appellate Body condemned not only the injunctions granted by the domestic courts but also the MERCOSUR exemption, affirming that, although the exemption was a consequence of a MERCOSUR ruling, it contravened the Brazilian environmental policy objectives. The exemption was also considered an inconsistent form of implementing a measure that was necessary in theory, but in fact caused unjustifiable discrimination and a disguised restriction on international trade. Accordingly, while the Panel respected the MERCOSUR ruling as a reason capable of justifying the Brazilian measure, the Appellate Body did not take it into consideration

¹²⁰⁸ With regard to obedience to the Mercosur ruling, Celso Amorin, Minister of Foreign Affairs of Brazil at that time, once declared that “for a country that aspires to be the Mercosur leader, questioning the arbitral award would be like ‘a shot on one’s own foot’, because later Brazil would lose its legitimacy in other disputes of its interest” (Bressan, S., ‘Brasil pode virar ‘lixão’ mundial de pneus: com 100 milhões de carcaças, país corre o risco de receber sobras da Europa via Mercosul’, *Jornal O Estado de São Paulo*, 17th March 2003, quoted in Morosini, Fabio, ‘The Mercosur Trade and Environment Linkage Debate: The Disputes over Trade in Retreaded Tires’, *Journal of World Trade* 44, Nr. 5 (2010), p. 1138).

¹²⁰⁹ WTO case Nr. WT/DS332/AB/R (3rd December 2007).

as a relevant reason for the manner chosen by the Brazilian government of applying the ban.

Demarcating the relationship between the MERCOSUR and the WTO as a result became even more challenging. Brazil is subject to both jurisdictions, but cannot comply with both at all times. The Appellate Body emphasised that it had realised that there appeared to be a conflict, but, from its point of view, there was not necessarily a divergence between the provisions and interpretations under MERCOSUR and those under GATT/WTO.¹²¹⁰ The Appellate Body offered two reasons to substantiate its position. Firstly, it recalled that Brazil had chosen not to invoke environmental policy to justify the import ban challenged before the MERCOSUR *Ad Hoc* arbitral tribunal, while there is in the Treaty of Montevideo¹²¹¹ one article that is similar to GATT Art. XX(b), namely Art. 50(d), which establishes the same exception as the one that can be found in GATT Art. XX(b).¹²¹² According to the Appellate Body, Brazil might have raised a defence relating to that article in the MERCOSUR arbitral proceedings, but had decided not to do so. And that is the reason why one may argue that there is no conflict between the WTO and the MERCOSUR. Secondly, the Appellate Body informed the parties that the understanding of GATT Art. XXIV: 8(a) combined with GATT Art. XX would exempt Brazil to the extent necessary to achieve the objectives aimed at by the measure (import ban). So, Brazil would be able to maintain some limitations on commerce within the customs union if they were necessary for the effectiveness of the objective to be achieved. Accordingly, in the Appellate Body's view, if MERCOSUR was consistent with GATT Art. XXIV and if the Brazilian import ban was necessary within the meaning of GATT Art. XX(b), Brazil would not be required to abolish the import ban on tyres imported from MERCOSUR countries, because that abolition contravened the objective of the measure protected by GATT Art. XX(b).¹²¹³

¹²¹⁰ Paragraph 234 of the Appellate Body Report.

¹²¹¹ The Treaty of Montevideo was signed in 1980 and established the Latin American Integration Association (ALADI), which was an important guide to the integration process in Latin America. The treaty was incorporated in Annex I of the Treaty of Asunción.

¹²¹² Art. 50 of the Treaty of Montevideo: No provision under the present Treaty shall be interpreted as precluding the adoption and observance of measures regarding:
(...)

d) Protection of human, animal and plant life and health;

¹²¹³ Appellate Body report, paragraph 234, footnote 445.

Hence, one can realise that, while the Panel adopted a more cooperative position as it refrained from assessing the MERCOSUR ruling, the Appellate Body adopted a more severe position against the cooperation principles and beyond its legitimate powers.¹²¹⁴ Although the Appellate Body avoided reviewing MERCOSUR's ruling, it discussed the manner in which Brazil had implemented it and assessed the Brazilian defence strategy in the MERCOSUR. The major conclusion, as a result, was that the ruling issued by the MERCOSUR was really one of the grounds on which the Brazilian ban on non-MERCOSUR tyres could not be justified. Accordingly, the Appellate Body found that Brazil was in violation of WTO law and requested Brazil to bring its measure into conformity with its WTO obligations. Once this decision was issued, there were two alternative ways for Brazil to comply. The first was to lift the import ban, renouncing the fundamental right to pursue the selected environmental protection level for human, animal and plant life, and health. The second alternative was to bring the import ban into compliance with the GATT 1994.

The Appellate Body's decision has given rise, as a result, to a conflict between the *Portarias* of Brazil, the rulings of the WTO and MERCOSUR law.

The Dispute Settlement Body adopted the Appellate Body's report on 17th December 2007 and a WTO arbitrator ruled on 29th August 2008 that the reasonable period of time for implementation would end on 17th December 2008.¹²¹⁵ Brazil requested that it have until September 2009 to achieve full compliance. According to Brazil, because the MERCOSUR exemption was mandated by a MERCOSUR ruling, it would have to negotiate an arrangement with its MERCOSUR partners, and the earliest time for such arrangement to take effect would be September 2009. The EC opposed this, arguing that a MERCOSUR-wide arrangement would not lead to the removal of the MERCOSUR exemption and that Brazil should not be given time to pursue measures that would obviously not bring about compliance. Brazil failed to meet the deadline of December 2008 and, as a consequence, the EC and Brazil on 5th January 2009 concluded a 'sequencing agreement', under which the EC maintained its "right to

¹²¹⁴ For more details, see Lavranos, N./Viellard, N., 'Competing Jurisdictions Between MERCOSUR and WTO', in *The Law and Practice of International Courts and Tribunals*, Nr. 7 (2008), pp. 205-234.

¹²¹⁵ Directorate General for Trade of the European Commission, *General overview of the active WTO dispute settlement cases involving the EU as complainant or defendant and of active cases under the trade barriers regulation*, p. 06. It can be found at www.trade.ec.europa.eu/doclib/docs/2007/may/tradoc_134652.pdf. Accessed 9 October 2012.

directly initiate retaliation procedures, but is obliged to first conduct a compliance review once Brazil adopts implementing measures”.¹²¹⁶⁻¹²¹⁷

d. Brazilian Level – Federal Supreme Court (STF)

As mentioned in section 3.1. of the present case analysis, in order effectively to stop imports of used tyres, the Brazilian Government initiated Federal Supreme Court (STF) proceedings. The President of Brazil, through the *Advocacia Geral da União*,¹²¹⁸ initiated *Arguição de Descumprimento de Preceito Fundamental* (ADPF)¹²¹⁹ proceedings in September 2006, requesting a ruling from the STF that imports of used tyres infringed the fundamental right to a balanced environment, the environmental policy and national regulations on the issue.¹²²⁰ The main reason for the proceedings was the several injunctions that Brazilian courts of lower instance continued to grant to national retreaders which made use of judicial remedies¹²²¹

¹²¹⁶ Directorate General for Trade of the European Commission, p. 06.

¹²¹⁷ More details on the further development of the case at WTO level will be provided in the next section.

¹²¹⁸ The *Federal Union General Advocacy Office*, which is conducted by the Attorney-General of the Republic.

¹²¹⁹ *An Allegation of Violation of Fundamental Precept*.

¹²²⁰ Since the STF is a constitutional court, it was basically asked to analyse the case in the light of the following articles of the Federal Constitution: Art. 170, IV and VI (the economic order should be founded and organized in conformity with, among others, the principles of economic freedoms and environmental protection), Art. 196 (the right to have a healthy life shall be granted by the State that shall implement social and economic policies in order to reduce the risk of diseases), and Art. 225 (everyone has the right to a balanced environment and the State has the duty to protect and preserve it to the present and future generations).

¹²²¹ The decisions of the national courts of lower instance were also based on Articles of the Federal Constitution. These were:

Art. 1 (on fundamental principles) - The Federative Republic of Brazil, formed by the indissoluble union of the states and municipalities and of the Federal District, is a legal democratic state and is founded on:

(...)

IV - the social values of labour and of the free initiative;

Art. 4 - The international relations of the Federative Republic of Brazil are governed by the following principles:

(...)

V - equality among the States;

Art. 5 (on fundamental rights and guarantees) - All persons are equal before the law, without any distinction whatsoever, Brazilians and foreigners residing in the country being ensured of inviolability of the right to life, to liberty, to equality, to security and to property, on the following terms:

(...)

XXXV - the law shall not exclude any injury or threat to a right from the consideration of the Judicial Power;

(...)

§ 1 - The provisions that define the fundamental rights and guarantees have immediate application.

against the prohibition of imports of used tyres. The Brazilian retreaders emphasised disrespect to isonomy,¹²²² because, while they were forbidden to import used tyres to retread in Brazil, remoulded tyres from MERCOSUR Member States could be imported, and potential damage to the environment linked to these tyres was disregarded. The government disagreed. It argued that allowing remoulded tyres from MERCOSUR countries resulted from an *Ad Hoc* arbitral tribunal ruling and the number of tyres from MERCOSUR countries was very small and could not be compared to the consequences of the import of used tyres from all over the world. In the light of that, one realises that the discussion focuses on the balance of fundamental principles, rights and guarantees, which are provided for in the Brazilian Constitution.

The government highlighted that the protection of the environment cannot be sidelined in order to enforce free trade, and, while there is no hierarchy among constitutional principles or rights, the protection of health and environment as human rights¹²²³ may be evaluated as having more weight because only international treaties regarding human rights can be incorporated in the Brazilian legal order as constitutional norms,¹²²⁴ whereas international treaties such as those relating to trade have the status of federal laws.

In its plenary decision on 23rd June 2009, the STF partially granted the ADPF. The majority of judges voted for its admissibility. In the judgment, the reporting judge cited studies that show that the decomposition of tyres can take up to 100 years, their disintegration is expensive, their burning releases several toxic residues and this

§ 2 - The rights and guarantees expressed in this Constitution do not exclude others deriving from the regime and from the principles adopted by it, or from the international treaties in which the Federative Republic of Brazil is a party.

¹²²² Art. 4, V of the Constitution (footnote *supra*).

¹²²³ First recognised by the United Nations General Assembly through Resolution 2398 of 3rd December 1968. Later, the UN Conference on Human Environment linked the environment to the right of life (*Declaration of the United Nations Conference on the Human Environment* of 1972, Preambular paragraph 1 and Principle 1), the World Charter on Nature of 1982 referred to the right to take part in environmental decision-making (paragraphs 15, 16 and 23), the *Rio de Janeiro Declaration on Environment and Development* of 1992 recognised the right to a healthy and productive life in harmony with nature and the right of access to environmental information and of public participation in environmental decision-making (principles 1 and 10), and the 2002 World Summit on Sustainable Development in Johannesburg accepted the consideration of the relationship between environment and human rights (*Johannesburg Plan of Implementation*, § 169).

¹²²⁴ Art. 5, § 3 - The international treaties and conventions on human rights, which are approved in each House of the National Congress, in two rounds by three fifths of the votes of the respective members will be equivalent to Constitutional Amendments.

burning can last for days or even months. The reporting judge also noted that the Declaration of Rio de Janeiro, signed in the 1992 United Nations World Conference on Environment and Development, enshrined the '*Princípio da Precaução*' (precautionary principle, in English) to all signatory states, according to their capacity. In it, governments have pledged to focus on prevention against environmental risks, since these are easier to combat than factual environmental damage. The reporting judge also wrote that:

“The right to health is endangered by the excess of waste. It is not only the right to absence of disease, it is also the right to physical well-being and social development. Therefore, the state is forbidden to be inoperative.”¹²²⁵

All legislation regarding the prohibition of imports of tyres, as a consequence, was declared constitutional with *ex tunc* effect. Court decisions that hindered the implementation of those rules and allowed or allow the import of used tyres of any kind were declared unconstitutional. But remoulded tyres from MERCOSUR countries were still allowed.

This paradoxical situation was resolved by Brazil's Secretary of Foreign Trade. In line with an opinion of the *Advocacia Geral da União*, he issued a new regulation, namely *Portaria* SECEX 24/2009, which was published in the Official Gazette on 28th August 2009 and prohibits the granting of new licences for the import of used and retreaded tyres of all types, irrespective of their origin. So this *Portaria* abolished the MERCOSUR exemption which had been considered inconsistent with the WTO Appellate Body trade disciplines and enabled Brazil to claim in its seventh status report to the WTO dispute settlement body, dated 15th September 2009, that it was in full compliance with the WTO recommendations and rulings. The European Commission, nonetheless, is continuing to monitor Brazil's full compliance.¹²²⁶

¹²²⁵ Translated from Portuguese by the author of this thesis.

¹²²⁶ The official documents can be found on the Internet. The general overview of the active WTO dispute settlement cases involving the EU as complainant or defendant and of active cases under the trade barriers can be found at: www.trade.ec.europa.eu/doclib/docs/2007/may/tradoc_134652.pdf and the status report by Brazil to the chairman of the WTO dispute settlement body is available at: www.trade.ec.europa.eu/doclib/docs/2009/november/tradoc_145474.pdf. Accessed 9 October 2012.

e. Concluding Remarks

A comparative analysis of the cases shows a series of incoherencies. Firstly, in the *Uruguay v Brazil-Import prohibition of remoulded tyres from Uruguay* case, brought before the MERCOSUR *Ad Hoc* arbitral tribunal, Brazil did not raise either environmental or human rights arguments in its defence. Although Brazil could have used Art. 50(d) of the Treaty of Montevideo, which establishes the same exception as GATT Art. XX(b), it did not choose to do so. Nevertheless, it is difficult to know whether Brazil would have won the case using Art. 50(d) of the Treaty of Montevideo as its main argument. In a later similar case brought by Uruguay against Argentina,¹²²⁷ for instance, the *Tribunal Permanente de Revisión – TPR* (MERCOSUR’s ‘Permanent Court of Review’) rejected Argentina’s defence under Art. 50(d) and stated that the principle of highest importance in an integration system such as that of the MERCOSUR is free trade. Subsequently, Brazil created an exception to the previous *Portarias* for “remoulded tyres” imported from MERCOSUR countries (the MERCOSUR exemption), but maintained the restriction on imports of used and retreaded tyres.

Secondly, in the *Brazil-Measures Affecting Imports of Retreaded Tyres* case at the WTO Panel level, Brazil defended the restriction on the imports on the ground that it was to protect its population’s health and the country’s environment, and the Panel accepted this argument based on GATT Art. XX.¹²²⁸ Conversely, the Appellate Body did not, since it considered the MERCOSUR exemption against the same argument that Brazil was using to maintain the restriction, namely the population’s health and the country’s environment. As a result, in my opinion, the WTO Appellate Body’s position seems to be coherent, unlike Brazil’s strategy at MERCOSUR level and then later at WTO level. Yet, to be coherent does not mean to be just, and the WTO Panel’s decision was more realistic, flexible and just (although not very coherent within its competences, one might add) than the Appellate Body’s. This was because

¹²²⁷ *Uruguay v Argentina-Import prohibition of remoulded tyres from Uruguay*, TPR decision on 25th October 2005.

¹²²⁸ The Panel, however, also criticised the injunctions granted by national courts.

the Panel balanced environment and trade issues in its decision, while the WTO Appellate Body's decision considered only trade.

Thirdly, at first glance, the STF decision might raise serious concerns. This is because, on the one hand, it argued that the import of used tyres infringes the human rights to health and environment and, on the other, it did not do anything concerning the MERCOSUR exemption.¹²²⁹ The legal response to this situation can be found in the Brazilian Code of Civil Procedure. According to its Art. 128, judges decide actions within the limits in which they were filed, are forbidden to be aware of issues that are not raised by the parties, and, thus, only the parties may take the initiative to provide information to judges.¹²³⁰ Therefore, since the STF was called upon to adjudicate upon an ADPF that related solely to the injunctions that Brazilian courts of lower instances continued to grant to national retreaders (i.e., not to the validity or constitutionality of the 'MERCOSUR exception'), the STF was tied to the issue of the action and was not in a position to analyse the impact of remoulded tyres from MERCOSUR Member States on the Brazilian environment and on the population's health. This means that the STF was not called upon to decide on the 'MERCOSUR exemption' at all and also did not have the ability to do so. As a result, by taking this perspective into consideration, the STF decision becomes clear. Last but not least, one also has to bear in mind that the President of Brazil, through its *Advocacia Geral da União*, requested a ruling from the STF to halt the injunctions to national retreaders that sought judicial remedies against the import ban contained in Art. 40 of *Portaria SECEX 14/2004*. The President's will was, thus, not to stop all imports, but to stop only those of used and retreaded tyres. The President's will is the government's will, and his ADPF could well have referred to the prohibition of imports on all sorts of used tyres, i.e. used, remoulded and retreaded, without making distinctions with regard to their type and, as a consequence, to country of origin, as the government of a country has the sovereign duty to protect its national environment at any time. If the President had done this, he would also have combated the 'MERCOSUR exemption', something that would have perfectly met the Brazilian

¹²²⁹ It is important to understand that a remoulded tyre is a specific type of used tyre and, as a result, will also become waste faster than new tyres, and represents the same risks to health and the Brazilian environment as used tyres from any other part of the world.

¹²³⁰ Art. 128 - *O juiz decidirá a lide nos limites em que foi proposta, sendo-lhe defeso conhecer de questões não suscitadas, a cujo respeito a lei exige a iniciativa da parte.*

environmental policy objectives plus GATT Art. XX(b) and the WTO Appellate Body's decision. In addition, if the President had decided to do this or to bring a new action requesting a ruling from the STF in order to stop the entry of remoulded tyres from MERCOSUR countries, the STF would probably have decided in the same way, namely giving preference to the human rights to health and the environment, as these rights have the status of fundamental rights in the Brazilian Constitution.

I believe that an *Ação Direta de Inconstitucionalidade* (ADIN),¹²³¹ which is a procedural instrument for the direct control of the constitutionality of laws and normative acts before the STF, could have rationalised this controversial issue in an easy and quick way. An ADIN can be filed by the President of the country, the directing board of the Federal Senate, the directing board of the Chamber of Deputies, the directing board of a State Legislative Assembly or of the Legislative Chamber of the Federal District, a State Governor or the Governor of the Federal District, the Attorney-General of the Republic, the Federal Council of the Brazilian Bar Association, a confederation of labour unions or a professional association of a nationwide nature.¹²³² So, it is clear that many actors of government and society have the legal capacity to make use of an ADIN. And, when the STF grants an ADIN, the decision has *erga omnes* and *ex tunc* effects.

Hence, supposing that the aforementioned had taken place, there would no longer be any conflict between Brazil and the WTO. On the other hand, a new conflict would have arisen, namely with regard to the previous MERCOSUR *Ad Hoc* arbitral tribunal decision in *Uruguay v Brazil-Import prohibition of remoulded tyres from Uruguay*

¹²³¹ 'Direct Action of Unconstitutionality', in English.

¹²³² Art. 103. Podem propor a ação direta de inconstitucionalidade e a ação declaratória de constitucionalidade: (Redação dada pela Emenda Constitucional nº 45, de 2004)

I - o Presidente da República;

II - a Mesa do Senado Federal;

III - a Mesa da Câmara dos Deputados;

IV - a Mesa de Assembleia Legislativa;

V - o Governador de Estado;

IV - a Mesa de Assembleia Legislativa ou da Câmara Legislativa do Distrito Federal; (Redação dada pela Emenda Constitucional nº 45, de 2004)

V - o Governador de Estado ou do Distrito Federal; (Redação dada pela Emenda Constitucional nº 45, de 2004)

VI - o Procurador-Geral da República;

VII - o Conselho Federal da Ordem dos Advogados do Brasil;

VIII - partido político com representação no Congresso Nacional;

IX - confederação sindical ou entidade de classe de âmbito nacional.

(9th January 2002). If so, although the Treaty of Asunción has no provision for a situation like the present one, according to the present MERCOSUR dispute settlement mechanism, which is regulated by the Protocol of Olivos, the affected MERCOSUR Member State(s) may, in principle, use its faculty to implement compensatory measures.¹²³³⁻¹²³⁴ Nevertheless, the Protocol of Olivos has been in force since 2004, i.e. it entered into force after the decision of the MERCOSUR *Ad Hoc* arbitral tribunal.

Accordingly, among Brazil's alternatives, there are two that I consider to be key. The first would be to request an *Opinión Consultiva* ('advisory opinion') from the Permanent Court of Review (TPR) on the validity of the arbitral decision today. The second alternative for Brazil – albeit one that might not be accepted by the TPR – would be to invoke it to review the *Ad Hoc* arbitral tribunal decision. Nevertheless, as already mentioned, the Olivos Protocol was not in force at the time of the arbitral decision and the TPR did not exist. In addition, according to the Olivos Protocol, a party may request the review of an *Ad Hoc* arbitral decision to the TPR within a period not exceeding 15 days from the notification.¹²³⁵ Thus, this second alternative would be risky, while an advisory opinion offers Brazil the advantage that it is not binding. Accordingly, the Brazilian court that requests the opinion will not be obliged to enforce it if it goes against Brazilian law, national jurisprudence or the present legal understanding.

Independently of the Brazilian strategy, the TPR could, in the face of a lack of specific norms on the issue in the MERCOSUR, follow an understanding similar to that of the *Ad Hoc* arbitral tribunal concerning Brazilian poultry, i.e. apply GATT/WTO norms on regional trade agreements and also general principles of

¹²³³ Art. 31(1) of the Protocol of Olivos: "If a State party to a dispute does not comply, in whole or in part, with an award issued by the Arbitration Court, the other party to the dispute may, at its discretion, within a one (1) year period starting on the day after the expiration of the term referred to in Article 29.1 and without prejudice of the application of the procedures established in Article 30, begin to apply temporary compensatory measures aimed at complying with the award, such as the interruption of concessions or other similar obligations."

¹²³⁴ There was a similar provision in Art. 23 of the Protocol of Brasília. Another uncertainty would be which of the Protocols should govern the implementation of compensatory measures, since the arbitral decision is of the time of the Protocol of Brasília, which is no longer valid.

¹²³⁵ Art. 17 (1) of the Protocol of Olivos.

international law.¹²³⁶ These would, as a result, also benefit an international rule of law and the TPR's ability to create new MERCOSUR-wide interpretations.

Nevertheless, *Portaria* SECEX 24/2009, which was issued by Brazil's Secretary of Foreign Trade and prohibits new licences for the import of used, remoulded and retreaded tyres to be issued irrespective of their origin, is the way that the Brazilian government has chosen to abolish the MERCOSUR exception that was inconsistent with the WTO Appellate Body disciplines. On the other hand, while Brazil is now in compliance with both Brazilian constitutional law as interpreted by the Brazilian Constitutional Court (STF) and the WTO recommendations and rulings, it is no longer in compliance with the MERCOSUR *Ad Hoc* arbitral decision, and Uruguay may argue that the decision of the Brazilian authorities is against MERCOSUR law. However, environmental and health protection are consistent with MERCOSUR, WTO and Brazilian laws. Therefore, Brazil is now behaving consistently with international law and broader concepts of justice.

The decision of the MERCOSUR arbitrators was correct, given its context. Now, with the general exception of GATT Art. XX(b), Brazil has the sovereignty to protect its environment, and Uruguay cannot do anything against this. Uruguay has no right to take countermeasures because of Brazil's prohibition.

7.2. Poultry Disputes

The *Poultry Disputes* are much less complex than the *Brazil Tyres Cases* and, as a result, the analysis will not be so long. The disputes were between Brazil and Argentina and about the use of Argentinean anti-dumping measures on poultry imported from Brazil. The first dispute was at MERCOSUR level and was initiated in

¹²³⁶ In the dispute between Brazil and Argentina about the use of Argentinean anti-dumping measures on poultry imported from Brazil, the Mercosur *Ad Hoc* arbitral tribunal was faced with a case for which there were no specific norms in the bloc and, as a result, decided by applying judicial precedent and the GATT/WTO norms on regional trade agreements as well as general principles of international law. General principles of international law are provided for in Art. 34 of the Protocol of Olivos. This article is about the law that *Ad Hoc* arbitral tribunals and the TPR should apply. The text is similar to that of Art. 19 of the Protocol of Brasilia of 1991.

2001.¹²³⁷ Brazil challenged an Argentinean law that imposed anti-dumping duties on the imports of Brazilian poultry.¹²³⁸

It is appropriate to mention that Brazil is a country with international competitiveness in poultry meat production. Between 1990 and 1999, the national production increased by 143.7% and, due to the creation of the MERCOSUR, Brazilian poultry meat exports to Argentina grew considerably. At the international level, Brazil's share in the total world production rose from 8% in 1995 to 9.72% in 1999,¹²³⁹ i.e. two years before the dispute at MERCOSUR level.

The key arguments of Argentina were to justify the measures, though it also raised the preliminary claim that there were no MERCOSUR norms controlling the matter and, consequently, the *Ad Hoc* Arbitral Tribunal had no jurisdiction and should abstain from ruling on the dispute. Although there were indeed no specific norms on the issue in the bloc, the Arbitral Tribunal discovered that it could still decide by applying judicial precedent and the GATT/WTO norms on Regional Trade Agreements as well as the general principles of international law. In fact, as an effect of the application of Art. 19 of the Protocol of Brasília¹²⁴⁰ in conjunction with Annex 1 of the Treaty of Asunción and the Regime of Final Adequation of Customs Unions, the Arbitral Tribunal rejected the preliminary claim brought by Argentina.¹²⁴¹ The tribunal found, in the merits, that the anti-dumping measures were incompatible with the free movement of goods in the intra-zone area and that the exceptions prescribed in the WTO rules¹²⁴² were the only accepted ones.

¹²³⁷ Under the dispute settlement system that was created by the Protocol of Brasília of 1991, which preceded the currently existing system of the Protocol of Olivos.

¹²³⁸ For more details, see *Laudo do Tribunal Arbitral ad hoc do Mercosul Constituído para Decidir sobre a Reclamação Feita pela República Federativa do Brasil à República Argentina sobre a "Aplicação de Medidas Antidumping contra a Exportação de Frangos Inteiros, Provenientes do Brasil (Res. 574/2000) do Ministério de Economia da República Argentina"* of 21st May 2001. It can be found at www.mercosur.int.

¹²³⁹ For more details, see Kume, Honório/Anderson, Patricia/Oliveira Jr., Márcio, *Identificação das barreiras ao comércio no Mercosul: a perpeção das empresas exportadoras brasileiras*, in: *Revista Planejamento e Políticas Públicas*, Brasília, Nr. 23, June 2001, p. 165-204.

¹²⁴⁰ Art. 19 of the Protocol of Brasília determines that disputes shall be settled on the basis of the application of the laws, decisions, resolutions and directives found in the Mercosur framework as well as the application of principles and dispositions of International Law.

¹²⁴¹ *Ibid.* Paragraphs 132 ff.

¹²⁴² GATT Art. XXIV, 8.

Yet, the tribunal did not consider the process of investigation through which Argentina went to be inconsistent with MERCOSUR norms and, thus, did not order Argentina to abolish the measures.

Brazil diverged, resorted to the WTO Dispute Settlement Body (*Argentina – Definitive Anti-Dumping Duties on Poultry from Brazil* WTO/DS 241, Panel Report, adopted on 19th May 2003), and claimed that Argentina acted inconsistently with the agreements on anti-dumping.¹²⁴³ Argentina, in turn, requested the Panel to refrain from ruling on it as the MERCOSUR dispute settlement system had already ruled on the case. Argentina also sustained that the Panel should recognise that Brazil had failed to act in good faith¹²⁴⁴ and then should confirm the prevalence of the ruling of the MERCOSUR *Ad Hoc* Arbitral Tribunal. This is because, according to the Argentinean understanding, a state that recourses to a regional system to settle a dispute and then, frustrated with the outcome, resorts to another system is not operating in good faith, mainly if it omits references to previous procedures and endings.¹²⁴⁵

The WTO Panel, in a different way, determined that a Member State should at least have violated a substantive provision of the WTO agreements in order to be judged as not operating in good faith. The Panel also stressed that Argentina did not allege the violation of any WTO provision. One can assume, in other words, that the Panel's conclusions might have been different if Argentina had claimed any violation of a general clause of the WTO agreements.

Among the third parties' arguments, the U.S. argued that “the Panel's role is to make findings in light of the WTO covered agreements.”¹²⁴⁶

In the end, the WTO Panel expressed disapproval of the Argentinean measures, i.e. opposing the MERCOSUR level conclusions, and ordered their abolishment. Yet, the

¹²⁴³ The Protocol of Brasilia had no provision on forum choice or exclusiveness. Since the Protocol of Olivos was not yet in force, there was also no TPR. For details on the dispute settlement system of the Mercosur, see section 1.3 of this thesis.

¹²⁴⁴ Paragraph 7.19 of the Panel Report.

¹²⁴⁵ Ribeiro, Samantha S. M., *Mercosur and the WTO*, in: Franca Filho, Marcílio T., et al, *The Law of Mercosur*, Oxford and Portland (Oregon), 2010, p. 137.

¹²⁴⁶ WTO Panel Report paragraph 7.30.

Panel did not reject the possibility of considering the understanding of a regional trade agreement (in this case, the MERCOSUR) as a precedent. Even so, the direct application of a regional trade agreement provision by the Panel so as to renounce from ruling in a case in which a breach of a WTO law provision is assumed appears to be unlikely to take place.¹²⁴⁷

a. Concluding Remarks

There is not much else to point out in addition to the analysis above. What has to be underlined, though, is that, in the *Poultry Disputes*, the WTO Panel decided to disregard the MERCOSUR and the WTO as organisations of the same system. It has insisted on the understanding that evaluates regional agreements as independent and self-contained regimes,¹²⁴⁸ reiterated the WTO itself as a different system that respects separate regional systems and stated that, in cases of rules' and jurisdictional overlappings, it is neither supposed nor even ready to respect the rulings of regional dispute settlement mechanisms.

An important observation to make is that Argentina did not concern itself with the WTO agreements and their interpretations, but required the Panel to rule in a certain way because of the ruling at MERCOSUR level. The WTO Panel's answer to that in its report includes the following:

“In other words, Argentina would have us apply the relevant WTO provisions in a particular way, rather than interpret them in a particular way. However, there is no basis in Article 3.2 of the DSU, or any other provision, to suggest that we are bound to rule in a particular way, or apply the relevant WTO provisions in a particular way. We note that we are not even bound to follow rulings contained in adopted WTO

¹²⁴⁷ Ribeiro, 2010, p. 137.

¹²⁴⁸ For details on self-contained regimes, see: Simma, Bruno/Pulkowski, Dirk, *Of Planets and the Universe: Self-Contained Regimes in International Law*, in: *European Journal of International Law*, Vol. 17, Nr. 3, 2006, pp. 483-529.

panel reports, so we see no reason at all why we should be bound by the rulings of non-WTO dispute settlement bodies.”¹²⁴⁹

In terms of access to justice, I believe that there was access to justice, namely in the last ‘round’ of disputes. My conclusion is based on four facts. Firstly, the MERCOSUR *Ad Hoc* Arbitral Tribunal, faced by a case for which there were no specific norms in the bloc, applied principles and provisions of international law, including those of GATT/WTO law. This makes perfect sense due to the issue and also the fact that both Argentina and Brazil are WTO members. Secondly, by doing so, arbitrators did not refuse to work and did not deny the suit brought by Brazil, although, as I have already mentioned, there were no specific norms in the MERCOSUR. Thirdly, by not ordering Argentina to abolish the measures, the arbitrators did make a manifestly unjust judgment – i.e. a denial of justice, as defined in Chapter I of this thesis – and, because of that, Brazil resorted to the WTO Dispute Settlement Body, where there was an appropriate decision. Lastly, the Panel ‘completed’ the previous MERCOSUR decision, because it condemned the Argentinean anti-dumping measures, ordered Argentina to abolish them and, as a consequence, finally ended with the Argentinean barriers to Brazilian poultry meat. Hence, it can be concluded that the WTO Panel improved the MERCOSUR arbitral findings and there was an international rule of law.

8. Chapter Conclusion

It can be argued that the dispute settlement body of the WTO is the supreme organ of the international trading system. This, as a consequence, may result in the ineffectiveness of particular regional rules, insecurity for Member States and difficult access to justice for parties involved in disputes due to the fragmentation of international law and institutions. Hence, because certain aims – some similar and others not – are pursued differently at national, regional and international levels, namely through different programmes without coordination and interdependence, the quality and coherence of international law is endangered. Also the proliferation of

¹²⁴⁹ WTO Panel Report paragraph 7.41.

institutions, tribunals, courts and court-like bodies, which were created to control specific issues and solve problems, represents a threat to substantive unity,¹²⁵⁰ since there is a lack of hierarchy both between international law norms and judgments.

On the other hand, one may argue that international law disagreements are part of the debate to develop the system further, and those who believe that fragmentation is a threat are international lawyers and those who think it is positive are lawyers who work in specific fields.¹²⁵¹ This can lead to one of two opposing developments, namely (1) contributing to the institutionalisation or even constitutionalisation of international law¹²⁵² or (2) more conflicting rules on the same issues of law, thereby resulting in more fragmentation of international law.¹²⁵³ But there is a cost, and who pays it? What about access to justice? Since the creation and development of international law, millions, or perhaps billions, of natural and legal persons did and did not have access to justice.

By using the abovementioned terms “development” and “to develop”, it is necessary to bear in mind that there is no development if there is no goal to achieve. In my opinion, the goal of developing the system is providing access to justice. This brings me to the issue of the interpretation of courts. The reason different courts interpret the same rules differently may be their specific competences, their will to develop new

¹²⁵⁰ Divergent and conflicting jurisprudence exists both at national and international levels. However, the core difference is that national legal systems have a hierarchically supreme or constitutional court that issues binding decisions for the parties and, depending on the country and subject, also for the domestic courts of lower instances.

¹²⁵¹ Some authors believe that the danger caused by the fragmentation of international law through the increase of international courts and tribunals is small, and the positive aspects compensate for the negative ones. E.g., see Buergenthal, T., ‘International Law and the Proliferation of International Courts’, in *Bacanja Euromediterranean – Courses of International Law*, Vol. V, 2001, pp. 31-43; S. Spelliscy, ‘The Proliferation of International Tribunals: A Chink in the Armor’, *Columbia Journal of Transnational Law*, 2001, pp. 143-175; Simma, B., ‘Fragmentation in a Positive Light, Diversity or Cacophony? New Sources of Norms of International Law – Symposium’, *Michigan Journal of International Law*, 2004, p. 845; all quoted in Lavranos, N., ‘On the Need to Regulate Competing Jurisdictions Between International Courts and Tribunals’, in: *EUI Working Papers*, MWP 2009/14 (Florence, European University Institute 2009), p. 06.

¹²⁵² See e.g.: Peters, A., ‘Compensatory Constitutionalism: The Function and Potential of Fundamental International Norms and Structures’, *Leiden Journal of International Law*, 2006, pp. 579-610; De Wet, E., ‘The International Constitutional Order’, *International & Comparative Law Quarterly*, 2006, pp. 51-76; Burke-White, W., ‘International Legal Pluralism, Diversity or Cacophony? New Sources of Norms in International Law – Symposium’, *Michigan Journal of International Law*, 2004, pp. 963-979; all quoted in Lavranos, 2009, p. 05.

¹²⁵³ See e.g.: Hafner, G., ‘Pros and Cons Ensuing from Fragmentation of International Law, Diversity or Cacophony? New Sources of Norms in International Law – Symposium’, *Michigan Journal of International Law*, 2004, pp. 849-863, quoted in Lavranos, 2009, p. 05.

rules in order to reach specific goals or, perhaps, lack of adequate knowledge. So, comity of judges – or judicial dialogue – may be the way to reach some degree of unity in an internationally fragmented system that does not have mechanisms in place to guarantee coordination or hierarchisation between international courts, tribunals and court-like bodies and their judgments. This does not depend only on governments and international organisations, but on judges too. In fact, judges – especially those who are not required on any legal basis to take other courts into consideration – could initiate the improvements. This is because the only manner in which judges within the international legal system may be expected to operate is through keeping themselves informed of the case law of other courts.¹²⁵⁴ With regard to that, I agree with *Brown*¹²⁵⁵ when he emphasises that courts could work as an ‘international judicial system’. He also believes that a certain degree of ‘common law of international adjudication’ concerning the way to handle comparable procedural issues should take place.¹²⁵⁶ So, I believe that judges, tribunals, courts and court-like bodies have the potential to be the main contributor to both the unity of international law and access to justice. In fact, they have perhaps an even more important role to play: the preservation of unity of justice and access to justice. Furthermore, placing human rights first is intimately linked to rule of law, which, in fewer words than those used by many key authors, can be defined as the method of minimising the danger created by the law itself and by abuses of power at both national and international levels, because the well-being of persons is the ultimate end of law, nationally and internationally. Though, in order to function, the rule of law needs efficient checks and balances.

In the *Brazil Tyres Cases*, which involved the dispute settlement mechanisms of the MERCOSUR, the WTO and Brazil, it can be concluded that the WTO was coherent and that it made clear how it defends its competences. With reference to the interplay between environmental and trade issues at the WTO, it can be argued that in the *Brazil Tyres Cases* the dispute might not have reached the WTO if Brazil had had a

¹²⁵⁴ Higgins, R., ‘The ICJ, the ECJ and the Integrity of International Law’, *Michigan Journal of International Law*, 2004, p. 20.

¹²⁵⁵ Brown, C., ‘The Cross-Fertilization of Principles Relating to Procedure and Remedies in the Jurisprudence of International Courts and Tribunals’, *Loyola of Los Angeles International and Comparative Law Review*, Vol. 30, (2008), p. 221.

¹²⁵⁶ See Brown, C., *A Common Law of International Adjudication* (Oxford and New York, Oxford University Press 2007).

completely different strategy at MERCOSUR level, namely by raising the human rights to health and environment before the *Ad Hoc* arbitral tribunal. This was not the only Brazilian flaw. The other was committed by the Brazilian President through the *Advocacia Geral da União*, which did not request the prohibition of imports of all sorts of used tyres through his ADPF before the STF.

So, can we say that there was access to justice at the STF? In view of the above, there was. This is because the STF decided on the basis of human rights and Brazil's international obligations regarding human rights issues, and cited the Declaration of Rio de Janeiro, which was signed by the participants in the 1992 United Nations World Conference on Environment and Development. In addition, the ADPF of the *Advocacia Geral da União* did not involve any WTO decision (neither that of the Panel nor that of the Appellate Body) and the 'MERCOSUR exemption' – the latter incidentally created by the Brazilian government without any involvement of the domestic judiciary. Thus, in the specific case of Brazil, the legal and political problems have to be faced with the notion of multi-layered governance that requires dynamic and proactive interpretations. Nevertheless, the internationalisation of the Brazilian legislative and judiciary powers is still something new. This is because the ratification of the most important international human rights instruments took place only in the 1990s¹²⁵⁷ – after the restoration of democracy to the country with the Federal Constitution of 1988.

Does my conclusion that there was access to justice at the STF mean that there was no access to justice at the MERCOSUR and WTO levels? I think the problem is rather one of a procedural gap as well as one of different rule of law regimes. To be exact, it is about what each court, tribunal or court-like body is asked to do concerning the same issue and their different legal reasoning. By the same token, if one solely analyses the *prééminence du Droit* of MERCOSUR law at the MERCOSUR *Ad Hoc* arbitral tribunal and WTO law at the WTO Panel and Appellate Body, one has to agree that each regime had the essential elements for access to justice, particularly procedural guarantees like fair trials by competent, independent and impartial

¹²⁵⁷ Marques, Claudia L./Lixinski, Lucas, 'Treaty Enforcement by Brazilian Courts: Reconciling Ambivalences and Myths?', in: *IV Anuário Brasileiro de Direito Internacional*, Vol. 1, (Belo Horizonte, 2009), p. 169.

arbitrators. This brings to the fore multilevel constitutionalism, which, for *Petersmann*, is the best way for international economic law to go.¹²⁵⁸ That makes perfect sense and is good for access to justice, other human rights and the rule of law rather than the ‘rule by men’ and their ‘rule by law’ – the latter two often without constitutional separation of powers and without judicial remedies, being, therefore, also often contested as unjust.¹²⁵⁹ In other words, if the Appellate Body had, *motu proprio*, upheld an elevation of human rights to the case involving Brazil and the EC (i.e., WTO case law), it would have filled the gap.

The WTO and regional organisations like the MERCOSUR should also not forget that the global marketplace demands minimal standards of consumer welfare and human rights.¹²⁶⁰ This reminds me of one of *Petersmann*’s newest proposals:

“as intergovernmental rules may lack democratic legitimacy and may unduly restrict individual rights, transnational ‘rule of law’ – as a constitutional, jurisdictional and judicial restraint protecting equal individual rights against abuses of ‘rule by law’ – may require and justify departures from the prevailing Westphalian conceptions of ‘rule of international law’, as illustrated by the Kadi-judgments of the ECJ”.¹²⁶¹

In both the WTO and MERCOSUR dispute settlement mechanisms, adjudicators should consistently interpret the law. Adjudicators must, therefore, also take into consideration significant rules of international law and broader concepts of justice when interpreting their WTO law and MERCOSUR law, respectively. *Qin*, while citing *Sacerdoti*, explains that “by drawing on common principles and shared criteria embedded in legal reasoning, the diversity of specific rules and the different

¹²⁵⁸ Petersmann, Ernst-Ulrich, ‘Multilevel Trade Governance in the WTO Requires Multilevel Constitutionalism’, in C. Joerges, E.-U. Petersmann (Eds.), *Constitutionalism, Multilevel Trade Governance and Social Regulation* (Oxford and Portland, Oregon, Hart 2006), pp. 5-57.

¹²⁵⁹ Petersmann, Ernst-Ulrich, ‘Administration of Justice in the World Trade Organization: Did the WTO Appellate Body Commit ‘Grave Injustice’?’, in EUI Working Papers, *Multilevel Judicial Governance Between Global and Regional Economic Integration Systems: Institutional and Substantive Aspects* (Florence, European University Institute 2009), p. 53.

¹²⁶⁰ Part of the aims of the ‘Geneva Consensus’.

¹²⁶¹ Petersmann, Ernst-Ulrich, *International Economic Law in the 21st Century: Constitutional Pluralism and Multilevel Governance of Interdependent Public Goods* (Oxford and Portland, Oregon, Hart 2012), p. 110.

institutional settings are ‘capable of being interpreted consistently’.”¹²⁶² On the other hand, parties involved in multilevel trade disputes also play a key role and must be coherent. In the *Brazil Tyres Cases*, however, Brazil was not coherent, as it had different strategies at the MERCOSUR and WTO levels that contributed to produce different decisions.

In the section ‘Access to Justice in the WTO’, I have emphasised that the WTO dispute settlement system is open only to States and customs territories with full autonomy to conduct trade policies, and that direct access for private parties at the WTO is impossible. Nevertheless, given that WTO law does prescribe protection of individual access to justice in the legal orders of WTO Members, two subsections named ‘Access to Justice for WTO Members’ and ‘Access to Justice for Private Parties’ performed the respective studies. With regard to access to justice for WTO Members, it can be concluded that the WTO dispute settlement mechanism tends to not regard individuals as such, but considers them objects so that the economic plans of WTO Members and companies can be successful – with governmental interests always having priority over the rights of companies, because only WTO Members can be parties at the WTO dispute settlement mechanism. Furthermore, several problems concerning the WTO and its DSB have been pointed out, and it can be concluded that the WTO ‘legal culture’ can be improved through consistent interpretation in conformity with the human rights obligations of governments as defined in the preamble and in Art. 31 of the VCLT. Concerning access to justice for private parties, although WTO law prescribes protection of individual access to justice in the legal orders of WTO Members, this right is repeatedly disregarded at domestic level. The main reason for this problem is the fact that most lawyers as well as domestic judges are completely unfamiliar with WTO law. What becomes evident, as a consequence, is the crucial role played by judges and arbitrators, as the case may be, at the level of WTO Members. Courts and court-like bodies are expected to consistently interpret cases involving WTO law, as international rule of law depends not only on

¹²⁶² Sacerdoti, Giorgio, *WTO Law and the “Fragmentation” of International Law: Specificity, Integration, Conflicts*, in: Janow, Merit E./Donaldson, Victoria/Yanovich, Alan (Eds.), *The WTO: Governance, Dispute Settlement and Developing Countries*, Huntington, 2008, p. 600, quoted in Qin, Julia Ya, *Managing conflicts between rulings of World Trade Organization and regional trade tribunals: reflections on the Brazil – Tyres case*, in: Bekker, Pieter H. F./Dolzer, Rudolf/Waibel, Michael (Eds.), *Making transnational law work in the global economy: Essays in Honour of Detlev Vagts*, Cambridge and New York, 2010, p. 619.

international organisations and the political will of governments, but also on the domestic judicial and public administrative agents responsible for interpreting and enforcing international rights and obligations that are for the benefit of citizens.

Chapter VI

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Final Conclusions

Differently from most of the comparative law theses and books, this dissertation comprises a comparative legal analysis among four legal systems:¹²⁶³ (1) the Brazilian, (2) the MERCOSUR, (3) the EU and (4) the WTO. For these reasons, it is both challenging and ambitious. The result is an innovative and provocative in-depth examination of access to justice in trade regulation. While studies concerning multilevel trade regulation, multilevel constitutionalism, human rights, access to justice and rule of law at national, EU and WTO levels have already been developed in Europe and in the United States, none of these has compared Brazil, which is one of the most important emerging countries in the world, the MERCOSUR and the WTO. And, to date, no research of this kind has been carried out in Latin America.

The thesis allows several conclusions. I would like to begin by highlighting four of them. Firstly, a fair, egalitarian, and democratic society in today's world continues to be far on the horizon, but it has been even further away before. While several improvements are needed today, initiatives should not be expected only from legal practitioners. Secondly, the right of access to justice, even though presents itself as *lex naturalis*, took a long time to become a reality for several peoples. There have been struggles that started in the medieval age and have not yet finished. These struggles created battles among opposing positions but also gradual changes. Both the battles and the changes continue to exist at national, regional, international and supranational levels. Thirdly, from a human rights perspective, while the law is supposed to protect the rights of all and access to justice for all, rule of law rather than rule by law is supposed to apply to everyone. Access to justice can be reached through different ways. This thesis has shown that the problems in Brazil, the MERCOSUR and the WTO are the result of different realities and institutional contexts. The most rational and efficient way to solve them seems to be by transnational constitutionalism. Fourthly, as we know, human beings are not equal, as they are created differently and

¹²⁶³ Most comparative legal researches tend to analyse two legal systems.

develop their abilities in different ways. Some places on Earth make the most of those abilities, but other places destroy them. The plenitude of 7 billion people is almost impossible because society was created and has been functioning in a way in which everyone has to somehow serve the others. There are owners, employers, and employees. Some examples are the owners of companies like Microsoft and Google, which are the employers, and the employees of Microsoft and Google. They seem to have a good working relationship. By contrast, there are restaurant owners in cities like Paris, for instance, who use workers from Algeria who toil away, cleaning restaurant kitchens for 12-hour shifts, without any employment contracts, for a pathetic salary, and often while living illegally in Europe. Similar situations also occur in Italy with workers from the Arab states, and in the United States with people from Latin America. In international trade the situation is not dissimilar: before the existence of conflicts among companies and sovereign States, conflicts begin in the minds of every person, in their personal desires, in their egoism and in their limited reasonableness. Thus, human rights need to be protected in all human interactions at national, international, supranational and transnational levels, including interactions between citizens and governments as well as solely between governments. As explained in the introduction of this thesis, the ‘legal scope’ of judicial decisions is particularly important to solve disputes. What is meant by the ‘legal scope’ of judicial decisions – namely national, regional, international, supranational and transnational – is a sort of ‘equalisation’ between the jurisdictional function (also known as ‘judicial function’ and ‘judicial role’), the interest of the parties involved (i.e., immediate legal reason) and the social interest in legal certainty and stability in the kind of relationship being judged (i.e., mediate legal reason). Below is a summary of the main findings of each chapter of this thesis.

1. The Constitutional Dimension of Access to Justice

For the purposes of this dissertation, access to justice is an essential human right that can be defined as the right of persons to enter courts of law, have their cases heard in balanced proceedings, which guarantee legal defence, adversary systems and lawful judges, and are adjudicated in accordance with substantive standards of fairness and

justice.¹²⁶⁴ For the sake of the international community of peoples and the nature of the planet, human rights should be coherently interpreted and have preference over other rights. This should create a solid transnational rule of law which minimises the threat created by the law itself and by abuses of power at national and international level, as the ultimate end of law nationally and internationally is the well-being of persons. Also integrating international law to the domestic system of rule of law and the constitutional system may help the harmonisation of international rules. Furthermore, the State can allocate its jurisdiction with other entities that might be at national, supranational and international levels. This allocation has the potential of allowing, among other things, the debureaucratisation of the right of access to justice.

2. The Legislative Dimension of Access to Justice

Markets are legal constructs that can only work if they have the appropriate rules. At global trade level, it is not a matter of a human right to free trade, but about the respect of human rights in free trade and the right of citizens to a free market with rule of law. The only way of protecting human rights effectively in trade issues seems to be linking trade agreements to the respect for human rights. Trade instruments should benefit human rights rather than prejudice them. Courts and court-like bodies are important to expose the voices of peoples and to correct political strategies.

3. The Brazilian Dimension of Access to Justice

In the Brazilian context, I have argued that methods of solving conflicts are still very bureaucratic, deficient and less open to what is happening abroad. The country's legislation and judiciary need reforms. Although the Federal Supreme Court has already affirmed that the current Brazilian constitutional system does not enshrine the principles of direct effect or immediate applicability of international treaties and conventions, one should not forget that a supreme court may change its views over time. As I have argued in the chapter on the Brazilian Dimension of Access to Justice,

¹²⁶⁴ I.e., a combination of the definitions of Francesco Francioni (p. 1) and Cândido Rangel Dinamarco (p. 115).

given that there is a number of constitutional obstacles to both the implementation and enforcement of international law (including the MERCOSUR law of integration) as well as the creation of possible supranational institutions with decision-making power, the STF seems to be the most appropriate national institution to initiate constitutional changes. Two proposals are (1) the creation of new interpretations to specific legal issues and (2) legal responses which the legislative and executive powers could have provided to society before, but had not done so.

4. The MERCOSUR Dimension of Access to Justice

Compared to other regional trade organisations, the MERCOSUR can be considered advanced. While Mexican citizens, for instance, need a passport and a visa to travel to the United States even though Mexico and the United States are Members of NAFTA, in the MERCOSUR area people do not need any passport in order to cross national borders. The Common Market of the South has also improved in social terms and even created a Parliament: PARLASUR. These are some of the aspects that show that the MERCOSUR style of regional integration is less Westphalian than the one of NAFTA. The trade cooperation among the NAFTA countries, in contrast, is much higher than the trade cooperation among MERCOSUR Member States.

From an economic point of view, it has to be pointed out that the GDP of the MERCOSUR is higher than the GDPs of countries like India, South Africa, Russia and Mexico. From a military point of view, the MERCOSUR is the region of the world that invests the least in military armaments-¹²⁶⁵ From a solidarity point of view, it is important to stress that no sanctions were imposed on Argentina even though the country, during the several national crises that recently took place, repeatedly closed its domestic market to MERCOSUR goods.

One of the serious problems in the institutional progress of the MERCOSUR is that policies change according to the governments elected at its Member States and their

¹²⁶⁵ Personal notes from the lecture of Jorge Fontoura, President of the MERCOSUR Permanent Court of Review, during the international conference '*A União Europeia e o Mercosul: relações presentes e futuras*', which took place from 5th to 7th December 2011 at the Faculty of Law of the University of Lisbon, in Portugal.

respective legislative and executive interests concerning the signature, ratification and implementation of MERCOSUR protocols and other documents. This makes it difficult for the European Union to negotiate agreements with the MERCOSUR because there are 5 representatives (i.e., the Presidents of the Member States) with 5 different domestic agendas.

With regard to access to justice in the MERCOSUR context, I have argued that, based on the definition of access to justice that has been presented in Chapter I of this thesis, it becomes clear that the MERCOSUR currently does not (although it should) guarantee the right of access to justice to its private persons, namely natural persons that are residents of any of its Member States and legal persons with their headquarters or branches located in Argentina, Brazil, Paraguay, Uruguay and Venezuela. This is because the entire dispute settlement mechanism of the bloc may only be used by its Member States. In other words, private persons in the MERCOSUR depend on the diplomatic protection of their countries, similarly to the situation at the WTO. If a legal or administrative measure linked to the MERCOSUR directly or indirectly affects private persons' rights, private persons have two options: (1) to file a claim before the national section of the Common Market Group of their Member State, which is going to consider the admissibility of the claim and whether or not to refer it to the MERCOSUR bodies, or (2) file a claim before a national court. The second option is the less complicated and the only one if private persons want to file a claim against their own countries, as this is currently impossible through the MERCOSUR dispute settlement mechanism. National judges become, as a consequence, crucial in promoting access to justice on MERCOSUR law issues as well as 'regular' domestic law issues.

5. The WTO Dimension of Access to Justice

It is important to highlight that all current WTO Members have committed themselves to respect human rights. In other words, WTO Members and WTO bodies have to interpret WTO law in conformity with human rights. Thus, the reasoning of Panels and Appellate Body decisions concerning human rights issues, for instance, should be performed by referring to the WTO Members' human rights obligations.

Both access to justice for WTO Members (i.e., at WTO level) and access to justice for private parties (i.e., at domestic level) depend on consistent interpretation. Although courts may work as an ‘international judicial system’,¹²⁶⁶ there is currently a dichotomy between national, regional and international reviews,¹²⁶⁷ which can be defined as incoherent, as each of the levels mentioned are treated as independent legal systems.

6. Concluding remarks on Access to Justice in Multilevel Trade Regulation: Brazil, MERCOSUR and WTO

The relationship between global governance, regional governance and national governance can be defined as ‘network governance’. This network may protect global public goods more effectively if there is consensus with respect to public goods. Consensus is a presumed ‘product’ for rule of law. It is a question of adjustments which, nevertheless, must be legitimate. The existing multilevel governance, however, has problems among national, international and supranational institutions and their policy areas, which do not have coordination and invariably create conflicts of interests and instabilities.¹²⁶⁸ In general terms, institutions should be a reflection of interests among States. The main problems are the sort of interests and the classic international law system based on power politics. The latter has proven to be incapable of democratically and effectively protecting human rights. Furthermore, one can clearly see that there are separate treaties for different legal and political themes and a lack of unity among political and legal procedures and institutions. There is, as a consequence, a legal pluralism that accepts different regimes without connecting them. Legal pluralism creates a high potential for conflicts between different legal regimes. Constitutionalism is a way of connecting diverse regimes and is an effective mechanism for limiting abuses of power and protecting human rights. The most important results of European constitutionalism are democratic peace and the protection of human rights through multilevel safeguards of judicial remedies.

¹²⁶⁶ Brown, 2008, p. 221.

¹²⁶⁷ Cottier/Hertig, p. 326.

¹²⁶⁸ There are institutions that created markets and made cross-border exchanges of goods possible. The WTO, for instance, is a market making institution, is highly politicised and very strong.

One can conclude that constitutionalism is not limited to the borders of Nation States and is the most appropriate form to guide global governance. This is because all problems concerning global governance are constitutional problems. Furthermore, global constitutionalism challenges national constitutionalism. According to *Maduro*, there are different ways of building global constitutionalism which do not have to replace legal systems but rather include them as ‘players’ or ‘partners’ with shared interests, rights and obligations in a constitutional frame.¹²⁶⁹ This brings to the fore ‘multilevel constitutionalism’, which has, however, no specific concept and *Kant* used it in order to explain why human rights need to be protected beyond the State and in relations among States. With regard to State responsibility concerning human rights issues, it is nowadays acknowledged that the State is responsible for all its acts both *jure gestionis* and *jure imperii*, besides also being responsible for all its omissions.¹²⁷⁰

It is worth highlighting that written Constitutions are not always a path to democracy.¹²⁷¹ In contrast, democratising the global system is a way of democratising internal systems. While on the one hand the Nation State defined the *demos* for democracy and has boundaries, on the other hand democracy in global governance has no boundaries. Global governance can, as a consequence, also enhance national governance that has questionable democracy or is undemocratic.

While laws – in the sense of legislation, positive law and statutory laws – result from governmental interests, justice should result from the proper interpretation and implementation of laws. Courts, tribunals and court-like bodies may even remodel the law by providing new interpretations to it. They have the ability of finding unwritten rights. This is nothing new and the Swiss Federal Tribunal serves as an example, as it

¹²⁶⁹ Notes from the lecture of Miguel Maduro, ‘Governance Beyond the States: A Constitutional and Comparative Institutional Approach for Global Governance’, which took place during the High-Level Workshop ‘The Object and Methodology of Global Governance’ of the Robert Schuman Centre for Advanced Studies at the European University Institute, Florence, on 24th January 2013.

¹²⁷⁰ Trindade, Antônio A. C., *International Law for Humankind: Towards a New Jus Gentium – General Course on Public International Law – Part I*, in: 316 *Recueil des Cours de l’Académie de Droit International de la Haye* (2005), ch. IX, pp. 256-257, quoted in Trindade, Antônio A. C., *The Access of Individuals to International Justice*, Oxford; New York, 2011, p. 2.

¹²⁷¹ In the United States, for instance, in some matters the Constitution can be an obstacle to democracy. The controversial fundamental right to keep and bear arms reflects well this situation. U.S. Constitution Amendment II (1791): “A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.”

became known for being very active in remodelling the law back in the 1970s and 1980s.¹²⁷² The function of a judicial system should go beyond rules and include principles of law, principles of justice and international rule of law. National and international courts have played a huge role during the past centuries and it can be firmly said that justice without courts is not possible. It is true that courts, tribunals and court-like bodies are not perfect, but the world remains without any other means of solving complex legal disputes.

My perspective about access to justice in multilevel trade regulation follows the one that can be regarded as European (or Kantian), as it defends that human rights must be used as an instrument to protect broadly defined human rights at the international law level. This is because, if States exist for the sake of their citizens and not the other way around, international law exists for the sake of the billions of natural and legal persons around the world. The well-being of these persons is the ultimate end of the law. Views outside the European Union, however, are still very different. While on the one hand there is no doubt that Nation States created new organisations that changed, to a large degree, the understandings of territory, government, sovereignty, representation and citizenship, among others, on the other hand most Nation States seem not yet to have reinterpreted the concepts of ‘constitutionalism’ and ‘constitution’ – actually, the EU Member States are the only exceptions. Among other things, a constitution has to tell us that the enforcement of the law must follow certain principles and assure that there are no loopholes. Most of the resistance to and critics of the constitutionalisation of the law of organisations like the WTO and, why not in the future the MERCOSUR also, exist because of legal formalism, which has national roots and is strong outside the European Union. Moreover, given that both the WTO and the MERCOSUR are purely intergovernmental rather than supranational, legal formalism is strong at both organisations.

Access to justice depends on the rule of law. But which rule of law do we need? It must be the one that delivers individual justice, as the legal protection of individuals means the protection of society as a whole and access to justice. If positive law does not provide the necessary solutions, these may be achieved if national and

¹²⁷² For details, see Hangartner, Yvo, *Grundzüge des schweizerischen Staatsrechts*, Zürich, Schulthess Polygraphischer Verlag, 1982, pp. 65-67.

international courts, tribunals, arbitral tribunals and court-like bodies that are permanent, semi-permanent and *Ad Hoc* provide the appropriate guidance through judgments that do not jeopardise human rights. This task becomes even more challenging according to the size of the gap between the law and society. Therefore, case law that respects and fosters precise protection of human rights is highly desirable. The genealogical distinctions between common law and civil law traditions are unimportant in a united system that seeks procedural efficiency and just solutions for every case.

The relationship between human rights and trade is controversial. The two main diverging theories provide different considerations. The first one considers human rights and trade law as two separate legal fields and the second one considers trade law as a means to promote human rights. It can be concluded that the second theory is the most appropriate and, therefore, positive national and international trade law as well as the rulings of judges and arbitrators must generate social effects that promote human rights. As I have already mentioned in the subsection entitled 'Trade Law and Access to Justice' in Chapter II, there is no divergence about the fact that States must protect the human rights of their citizens. Hence, in view of this common understanding, it can be assumed that human rights protection is transferable to international organisations, which include intergovernmental ones. The WTO and the MERCOSUR are just two among several examples.

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